Supreme Court, U.S.
FILED

JUL 30 2003

No. 03 185

In The
Supreme Court of the United States

WEST AMERICAN INSURANCE CO.,
Petitioner,
v.
KEVIN G. JACKSON; ET AL.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

*MICHAEL M. NELTNER
FREUND, FREEZE & ARNOLD
105 E. Fourth St., Suite 1400
Cincinnati, Ohio 45202

513-665-3500

Attorney for Petitioner
**Counsel of Record*

July, 2003

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

203 pp

QUESTIONS PRESENTED

1. Whether Respondent should be able to overturn his own Final Judgment obtained in a Federal District Court using Civil Rule 60(b)(6) relief where the plaintiff himself pursued and won the Final Judgment and where the Sixth Circuit's decision, if it stands, could result in the payment of up to $1,000,000 by Petitioner whose insured was not negligent and was never involved in the conflict between the original litigants;

2. Whether Civil Rule 60(b)(6) can be used to circumvent the finality of Federal District Court Final Judgments in civil cases in order to afford plaintiffs a second chance at higher damages under state law where the Sixth Circuit's decision clearly conflicts with the stated purpose of Rule 60(b) and directly conflicts with decisions of other circuits and decisions within its own (Sixth) circuit;

The Court's ruling in this case will also profoundly impact the following question:

3. Whether the insurers of small businesses of the United States (and their insureds) should be subject to multi-million dollar lawsuit awards against them where the conduct of independent third-party tortfeasors is the sole proximate cause of a plaintiff's injury and the business's conduct is not even remotely connected to the cause of the injury for which the plaintiff seeks redress.

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioner: The West American Insurance Company ("West American"), a nongovernmental corporate party to the proceedings before United States District Court for the Southern District of Ohio and United States Court of Appeals for the Sixth Circuit.
West American here discloses that it is an Indiana company, that the parent corporation is Ohio Casualty Corporation, and that there are no publicly held companies which own 10 percent or more of West American's stock.
West American, is a wholly owned division of Ohio Casualty Corporation, a publicly-traded corporation. (NYSE symbol, "OCAS").

Respondents: Kevin G. Jackson, an individual, and in his representative capacity as administrator of the estate of Paula Kay Jackson, and as personal representative of her next of kin and beneficiaries.

Soy Sok, an individual.

RULE 29.6 STATEMENT

West American hereby identifies the Ohio Casualty Corporation as its parent corporation. The Ohio Casualty Corporation owns 100% of West American's stock. There are no publicly held entities which own 10% or more of Ohio Casualty Corporation's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

RULE 29.6 STATEMENT iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES ix

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....

STATEMENT OF THE CASE 2

A. The Sixth Circuit erred in holding that 60(b)(6) Relief is Appropriate in Favor of Respondent Because Scott-Pontzer "Created a New Theory of Recovery" 4

B. The Scott-Pontzer Decision of the Ohio Supreme Court 5

C. The Scott-Pontzer Decision is not a Change in the Law or new theory of recovery 8

D. The Sixth Circuit's Decision Creates an Avenue By Which Plaintiffs Nationally May Seek to make Small Businesses Responsible for their own Private Torts 10

REASONS FOR GRANTING THE PETITION 12

I. The Circuits Are Divided Over Whether An Intervening "Change in the Law" Is Sufficient Grounds Justifying Overturning A Final Judgment Of A Federal District Court and only this Court can Resolve the Conflict. 14

A. This Case Squarely Presents the Conflict 15

B. The Issue Presented by the Conflict is Recurring and of Great Practical Importance and Will Severely Impact The Petitioner, Other Insurers and Small Businesses Across the United States 18

II. The Sixth Circuit's Decision Clearly Contravenes State Law On The Issue Of Whether Scott-Pontzer v. Liberty Mut. Fire Ins. Co. Is A Change In The Law, or Represents a New Theory of Law, Which Only This Court Can Dispel 19

A. Scott-Pontzer is not a change in the law 19

B. The Scott-Pontzer "theory" has been in force since 1988, well before Scott-Pontzer was decided (in 1999) 19

III. The Sixth Circuit Improperly Granted Relief under Rule 60(b)(6) 24

A. The Sixth Circuit Erred In Holding That Rule 60(b)(6) Relief Was Proper Where Respondent's Claimed Relief falls under Other Categories of Rule 60, but Respondent does not meet their Criteria 24

B. The Sixth Circuit's Decision Destroys The Principle Of "Finality" Upon Which Parties Should Be Able To Rely, Which only this Court can Remedy 27

CONCLUSION 28

TABLE OF AUTHORITIES

Cases: **Page(s)**

Achauer v. Monroe Guarantee Ins.,
2001 Ohio App. LEXIS 2985 20

Agostini v. Felton, 521 U.S. 203 (1997) 12

Decker v. CNA Ins. Co., 66 Ohio App.3d 576,
579, 585 N.E.2d 884, 886 22

*Ezawa v. Yasuda Fire & Marine Ins. Co. Of
America (September 22, 1999)*, 86 Ohio St.3d 557 6

*Government Financial Services One Ltd.
Partnership v. Peyton Place, Inc.*, 62 F.3d 76 (1995) .. 16

Gruelich v. The Hartford, Cuyahoga App.
No. 80987, 2002 Ohio 7229 23

Heiney v. Hartford, Franklin App. No. 01-AP-220,
2002 Ohio 3718 23

King v. Nationwide Ins. Co., 35 Ohio St.3d
208, 211, 519 N.E.2d 1380 (1988) 21

McCurry v. Adventist Health System, Inc.,
298 F.3d 586, 592 (6th Cir. 2002) 16, 25, 26

Oakar v. St. Paul Fire & Marine Ins. Co., 2003 Ohio 552, (Ohio App. Cuyahoga Cty. Feb. 6, 2003) 23

Peerless Electric Co. v. Bowers, 164 Ohio St. 209, 129 N.E.2d 467 ..... 9, 19, 23

Scott-Pontzer v. Liberty Mut. Fire Ins. Co., 85 Ohio St.3d 660 (June 23, 1999) 5

* * * * * * * *

Constitutional and Statutory Provisions:

28 U.S.C. §1254(1) 2

* * * * * * * *

IN THE
SUPREME COURT OF THE UNITED STATES

THE WEST AMERICAN INSURANCE COMPANY
Petitioner,

V.

KEVIN G. JACKSON, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The West American Insurance Company, Petitioner, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is included in the Appendix at Exhibit B1-B6 and is unreported. The opinion of the district court is included in the Appendix at C1-C7 and is unreported. The original Order of the district court granting Judgment (before 60(b) relief) is included in the Appendix at D1-D2 and is unreported.

JURISDICTION

The court of appeals judgment was entered on May 5, 2003. The court of appeals denial of a motion for rehearing en banc was entered on June 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On September 6, 1997, Respondent's wife was visiting a relative in Ohio. Respondent, who was employed by Hater Industries Inc. ("Hater"), a West American insured, was not with her at the time and was not in the course and scope of his employment. During the visit, an altercation allegedly occurred across the street and she went to investigate. While crossing the street, one of the parties to the altercation jumped in his car and ran her over. She died from these injuries. Respondent now seeks to recover under his employer's commercial general liability policy which has one million dollars in commercial liability limits (not auto coverage) available.

This case raises the important question of whether an insurance company (and, as well, the small businesses of the United States) should be subject to multi-million dollar lawsuit awards because of the word

"you" in standard commercial general liability policies of insurance and whether a plaintiff, seeking to enforce a decision by the Ohio Supreme Court which determined that he can make a claim against his own small business employer's insurer, may overturn his own Final Judgment entered in a Federal District Court invoking Civil Rule 60(b)(6) relief. Ask any person "on the street" if they think their employer's insurance should pay if they are injured in a car accident on their way to the grocery store and the answer will invariably be "No." Ask any judge if they think a party should be able to overturn their own default judgment because they neglected to read recent caselaw and the answer will invariably be "No." This case, therefore, begs review by this Court because both of these elements are present, combining to work a severe injustice to Petitioner and to small business insureds.

This case raises a second important question of whether the Sixth Circuit's decision upholding the District Court's grant of Rule 60(b)(6) relief should stand where the Sixth Circuit's decision is in direct conflict with the decisions of other circuits and, indeed, decisions within its own circuit. The question before this Court is not simply whether the Sixth Circuit's decision in this case is in error, but more fundamentally

whether any federal court should be able to use Rule 60(b)(6) as a deus ex machina to compromise the finality of District Court Final Judgments to give Plaintiffs a second chance at higher damages awards where clearly the other provisions of Rule 60(b) address a movant's claimed relief but the movant cannot meet their requirements.

It should be noted that Respondent here seeks to use the Federal Courts and Rule 60(b) to overturn a default judgment awarding him specific damages because he now seeks up to the policy limits of his employer's commercial liability policy with West American even though the Respondent was not present when the accident occurred, was not in the course and scope of employment when the accident occurred, has never paid a premium for the insurance, and the vehicle involved in the accident was owned by a third-party tortfeasor which also was not insured under the subject policy.

A. The Sixth Circuit Erred in Holding That 60(b)(6) Relief is Appropriate in Favor of Respondent Because Scott-Pontzer "Created a New Theory of Recovery."

The sole basis for the Sixth Circuit's decision is that Respondent was entitled to relief under Rule 60(b)(6) because the *Scott-Pontzer* decision was an "intervening change in the law" or "new theory of recovery" justifying the Respondent in overturning the default judgment so he can file a lawsuit against his employer's insurance company for the death of his wife.

As numerous decisions by Ohio courts dating back to 1988 make clear, there is nothing "new" about the so-called "*Scott-Pontzer*" theory of recovery. Ohio courts have consistently held that "ambiguous" contracts will be construed against the drafter of the contract and that the word "you" in certain commercial contracts of insurance is problematic. (The important cases will be cited below and included in the Appendix).

Thus the Sixth Circuit's decision is clearly in error since it rests on a faulty foundation and is in direct conflict with the state court decisions.

B. The Scott-Pontzer Decision of the Ohio Supreme Court.

On June 23, 1999, the Ohio Supreme Court decided the case of *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660 (June 23, 1999) (App. D). This

case held that certain corporate insurance policies contained ambiguous language which, under existing Ohio law, would allow coverage to the corporation's employees under circumstances arguably similar to Respondent's case. Before that decision, Respondent had filed a motion for default judgment in the U.S. District Court for the Southern District of Ohio, Western Division, asking that court to determine that the Tortfeasor, Soy Sok, was in default and asking for a damages award. It was while that default judgment motion was pending that the Ohio Supreme Court decided *Scott-Pontzer*. Four months after the case was decided, Respondent still had not dismissed the default judgment motion and the District Court granted the motion. On October 18, 1999, the District Court entered a Final Judgment confirming the default judgment. (App. C).

While that default judgment motion was pending and shortly after the *Scott-Pontzer* case was decided, yet still approximately one month before the district court rendered its Order Granting a Default Judgment to Respondents in this case, the Ohio Supreme Court decided *Ezawa v. Yasuda Fire & Marine Ins. Co. Of America* (September 22, 1999), 86 Ohio St.3d 557 (App. E), which simply recognized that the *Scott-Pontzer*

opinion may also be extended to cover family members of a corporate employee, such as Mrs. Jackson. Under *Ezawa*, it is now possible for plaintiffs in Ohio to recover against a family member's employer's corporate insurance policy for injuries suffered at the hands of an uninsured or underinsured motorist while engaged in activities completely unrelated to their employment. The "classic" example of the application of this rule at its most extreme is a parent recovering under a McDonald's corporate insurance policy for injuries sustained while the parent is on her way to the grocery store and the family's sixteen-year-old son works for McDonald's.

In its decision granting Respondent's default judgment, which the court allowed to mature into a Final Judgment and which was granted a full four months after *Scott-Pontzer* was decided, the District Court granted judgment in favor of the Respondent and against the tortfeasor, Soy Sok (the "Tortfeasor") in the amount of $100,000.00. See Judgment (App. C). West American intervened with permission of the District Court and sought to enforce that judgment.

C. The Scott-Pontzer Decision is not a Change in the Law.

The District Court's Judgment held as follows:

FINAL JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Plaintiffs' motions for entry of default (doc. 19); for default judgment (doc. 20); and for order deeming requests for admissions admitted (doc. 21) are GRANTED as to defendant Sok. Default Judgment is GRANTED against defendant Soy Sok in the amount of $100,000 plus interest and costs pursuant to order of this Court (see doc. 17). Defendant Allstate Insurance Company is liable to plaintiff for up to $50,000 of that amount, plus interest and costs. Case is TERMINATED on the docket of this Court.

October 18, 1999 Kenneth Murphy, Clerk (App. C).

Almost one year later, on October 5, 2000, Respondents filed a Rule 60(b) Motion to Set Aside the Court's Entry of Default Judgment. Respondents sought relief under a number of subsections of the Rule, including subsection (b)(6). The district court granted Respondent's motion and allowed them to overturn their own default judgment. On appeal to the United States Court of Appeals for the Sixth Circuit, the Sixth Circuit affirmed.

In its decision, the Sixth Circuit determined that the District Court properly granted relief pursuant to Ohio Rule of Civil Procedure 60(b)(6) because the *Scott-Pontzer* decision represented a "new theory of recovery." Opinion at 4-5 (App. A).

To the contrary, the Ohio Supreme Court has always held that, "The general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law." *Peerless Electric Co. v. Bowers*, 164 Ohio St. 209, 129 N.E.2d 467 (App. F). This decision is so well

entrenched in Ohio law that it has come to be known as the "*Peerless* doctrine."[1]

Therefore, it is clear that the *Scott-Pontzer* decision is not "new law" because the Ohio Supreme Court was merely applying long-existing contract principles to interpret an insurance contract directly before it.

D. The Sixth Circuit's Decision Creates an Avenue By Which Plaintiffs Nationally May Seek to make Small Businesses responsible for their own Private Torts.

If the Sixth Circuit's decision is allowed to stand, it would have important ramifications for recovery in other states under the same theory. Recovery by employees and their family members for injuries incurred not within the scope of employment will have a serious effect on coverage issues, premiums, and small businesses.

Here, not only is Hater Industries and West American being told by the courts that they are subject to payment of one million dollars for an accident that

---

[1] Here, no previous precedent was ever overruled, as existing Ohio Appellate case authority supported making these types of claims.

had nothing to do with the conduct of Hater's business, but they are also being told that Final Judgments of federal courts mean absolutely nothing. Petitioner requests the aid of this Court, therefore, for the following reasons:

First, numerous federal courts of appeals, including the Sixth Circuit, have consistently held that Rule 60(b)(6) relief is only to be used in "extraordinary circumstances." It should be axiomatic that Respondent's failure to recognize a principle of law which has existed for eleven years prior to his own headstrong pursuit of Final Judgment does not constitute even a good reason for overturning his own judgment to the detriment of other parties, much less the "extraordinary circumstances" necessary to warrant Rule 60(b)(6) relief.

Second, not only is Respondent seeking 60(b)(6) relief under circumstances that do not even approach "extraordinary," he also seeks to misuse the federal courts to take advantage of a quirky state law (making corporations and their insurers pay employees not in the course and scope of employment who are injured by underinsured motorists). The clear temptation, if this is allowed to stand, is to misapply Rule 60(b) in order to provide Plaintiffs a second opportunity to gain relief

under state law. The combination of these two events will have significant consequences to insurers who never collected premiums for such coverage and small businesses who will have to pay such premiums in the future. At the very least, federal courts need this Court's guidance in applying the provisions of Rule 60(b)(6) as evidenced by the conflict among the circuits.

REASONS FOR GRANTING THE PETITION

The decision below creates a conflict among the federal circuits, a conflict between the Sixth Circuit and the state courts of Ohio, and even represents a conflict within the Sixth Circuit itself.

Further, this Court has struggled with the prospect of a party attaining Rule 60(b) relief in the absence of "extraordinary circumstances." *See Agostini v. Felton*, 521 U.S. 203 (1997) (granting Rule 60(b)(5) relief to petitioner Board of Education of the City of New York and parents of parochial school students due to a significant change in the subsequent development of the Court's establishment clause jurisprudence, but recognizing that "Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)[6]." Justice O'Connor authored the lead opinion. Other

justices recognized that the Court's limited grant of 60(b) relief in this case constituted a "problematic use of Rule 60(b)." Ginsburg, J, dissenting, with whom Justice Stevens, Justice Souter, and Justice Breyer joined.

Likewise, here, this uncharacteristic use of 60(b) relief was even more disturbing because what the Court says to Petitioner is not only that: (1) you will be forced to pay up to $1,000,000 to a party who never paid you a premium for insurance coverage and never expected to be covered under your policy, was not involved in any way in the tort which caused the subject injury, and the payment has no nexus to the tortfeasor's act; but also that (2) the reason you will pay is because even though the Respondent below doggedly pursued a Final Judgment of a Federal District Court for over four months after the "intervening change in the law" was decided, and eventually obtained that judgment, the courts are now telling you that that same Respondent can overturn his own final judgment and his excuse is that he was not aware of a law which had existed for eleven years before he sought the Final Judgment; and (3) a Federal Court of Appeals is affirming Respondent's misuse of the court system to aid him in attaining his relief against you under the auspices of a clearly faulty legal analysis.

I. The Circuits Are Divided Over Whether An Intervening "Change in the Law" Is Sufficient Grounds Justifying Overturning A Final Judgment Of A Federal District Court and only this Court can Resolve the Conflict.

The Sixth Circuit determined that Rule 60(b)(6) relief is appropriate where there is a "new theory of recovery" and that the *Scott-Pontzer* decision truly was such a new theory of law sufficient to warrant the overturning of a Final Order of a federal district court.[2]

---

[2] In its decision, at footnote 1, the Panel states:

> "[West American] argues that the Ohio Supreme Court did not announce a 'change in law,' but rather clarified existing law - - that ambiguous contracts are to be strictly construed against the insurer. [West American] is correct insofar as the state court employed a well-established rule of construction to construe the contracts at issue against the insurer. However, there is no indication that the *Scott-Pontzer* theory of recovery preexisted the district court's decision. Thus, although the *Scott-Pontzer* decision did not involve a change in the law in the sense of a reversal, it created a new theory of recovery.

A. This Case Squarely Presents the Conflict.

It is undeniable that the Ohio Supreme Court's *Scott-Pontzer* decision does not constitute a "change in the law" or a new theory of recovery at all, but rather a statement of what the law always has been. Therefore, the Sixth Circuit's sole basis for its decision is erroneous and in direct conflict with decisions of the Ohio courts which have held that *Scott-Pontzer* is not new law.

Further, as to the use of 60(b)(6) to remedy Respondent's situation, this decision directly conflicts with other decisions of the Sixth Circuit itself, which have held as follows:

> [R]elief under Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination of litigation. This is especially true in an application of subsection (6) of Rule 60(b), which applies only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule. This is because almost every conceivable ground for relief is covered under the other subsections of Rule 60(b). Consequently, courts must apply Rule 60(b)(6) relief only in unusual and extreme situations where principles of equity mandate relief.

See eg., *McCurry v. Adventist Health System, Inc.*, 298 F.3d 586, 592 (6th Cir. 2002) (App.G) (emphasis added).

Finally, the subject decision by the Sixth Circuit Panel represents a conflict with other circuits. For example, in *Government Financial Services One Ltd. Partnership v. Peyton Place, Inc.* , (App. H) 62 F.3d 767 (1995), the Fifth Circuit held that a Rule 60(b)(6) motion for relief can only be granted where the information which forms the basis for the requested relief cannot be discovered through due diligence. The court stated as follows:

> Even if we assume what Peyton Place fails to argue, that Peyton Place has stated a Rule 60(b)(6) claim distinct from its Rule 60(b)(2) and (b)(3) claims, its Rule 60(b)(6) claim fails because we have expressly held that a district court's equitable powers under section (b)(6) do not extend to considering evidence that could have been presented at trial. "This clause of the Rule provides 'a grand reservoir of equitable power to do justice in a particular case,' but that well is not tapped by a request to present evidence that could have been discovered and presented at trial through the exercise of due diligence."

> (Citation omitted). Had it exercised due diligence, Peyton Place could have discovered and presented at trial the photocopied first page in the mortgage records, the RTC's seizure of the Oster & Wegener files, and the assignment of proceeds of contract referring to the forbearance agreement. See supra part II.A. Therefore, the district court did not abuse its discretion in refusing to grant Peyton Place's Rule 60(b)(6) motion. (Citation omitted).

Likewise in this case, had he exercised due diligence, Respondent could have read the multiple cases over the past eleven years awarding judgments to Plaintiffs like Respondent where the word "you" in corporate insurance policies was deemed "ambiguous." At the very least, Respondent should have read the *Scott-Pontzer* decision long before the Final Judgment Entry was entered of record and dismissed the default judgment motion. Having failed to take either course, the District Court and Sixth Circuit's "remedy" by way of Rule 60(b)(6) is certainly inappropriate and merits the attention of this Court.

B. The Issue Presented by the Conflict is Recurring and of Great Practical Importance and Will Severely Impact The Petitioner, Other Insurers and Small Businesses Across the United States.

The temptation by federal courts to apply the 60(b)(6) patchwork exception inappropriately can only be remedied by this Court. Further, the harm in this case is substantial in that many states have uninsured/underinsured motorist statutes similar to Ohio's and standard insurance "ISO" forms contain similar language used in the West American policy issued to Respondent's employer. A combination of misuse of Rule 60(b)(6) relief and a *Scott-Pontzer* theory of recovery will work severe harm and injustice to small business insurers and, as a result, to the small businesses of America. Recovery from a party who had absolutely nothing to do with the tortious cause of Respondent's injury is bad enough, but when compounded by the procedural errors worked in this case, the matter screams out for a just reversal.

II. The Sixth Circuit's Decision Clearly Contravenes State Law On The Issue Of Whether Scott-Pontzer v. Liberty Mut. Fire Ins. Co. Is A Change In The Law, or represents a New Theory of Law, Which Only This Court Can Dispel.

A. Scott-Pontzer is not a change in the law.

The Ohio Supreme Court has always held that a decision of a court of supreme jurisdiction overruling a former decision is not new law, but rather it never was the law. This important recognition of Ohio appellate jurisprudence was first pronounced in *Peerless Electric Co. v. Bowers*, 164 Ohio St. 209, 129 N.E.2d 467 (App. I).

B. The Scott-Pontzer "theory" has been in force since 1988, well before Scott-Pontzer was decided (in 1999).

A number of Ohio cases beginning in 1988 have all held the same thing -- that the word "you" in a commercial liability contract might be seen as "ambiguous" and should be construed strictly against the insurance company which drafted the policy. The practical effect of these decisions, of course, is to require

businesses to offer uninsured/underinsured motorist insurance coverage under their commercial insurance policies to all of their employees for any kind of auto accident at any time of the day and regardless of whether the employee was working for his or her employer at the time of injury.

In *Achauer v. Monroe Guarantee Ins.*, 2001 Ohio App. LEXIS 2985 (App. J), the Ohio Fifth Appellate District specifically stated that the *Scott-Pontzer* decision was not "new law," but merely the application of well-established contract principals to the interpretation of the language of an already existing contract of insurance. ("Appellant claims that the Ohio Supreme Court's decision in *Scott-Pontzer*, supra, cannot be applied retroactively. We disagree. Appellant argues that prior to *Scott-Pontzer*, supra, the existing law in Ohio was different than that subsequent to such decision. However, the Supreme Court in *Scott-Pontzer*, supra, did not create new law. Instead it merely interpreted the language of an already existing contract of insurance applying the rules of construction.") Id. at *5-6 (emphasis added). This argument and the citation to *Achauer* was clearly set forth in the Final Reply Brief filed by Petitioner in the Sixth Circuit, at pg. 6.

Thus, in its decision, at footnote 1, the Panel incorrectly states:

> [West American] argues that the Ohio Supreme Court did not announce a "change in law," but rather clarified existing law - - that ambiguous contracts are to be strictly construed against the insurer. [West American] is correct insofar as the state court employed a well-established rule of construction to construe the contracts at issue against the insurer. However, there is no indication that the *Scott-Pontzer* theory of recovery preexisted the district court's decision. Thus, although the *Scott-Pontzer* decision did not involve a change in the law in the sense of a reversal, it created a new theory of recovery.

(Emphasis added).

To the contrary, numerous decisions like *Achauer* directly held that *Scott-Pontzer* was not a change in the law or a new theory of recovery.

This, in *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 211, 519 N.E.2d 1380 (1988) (App. K) the court found insurance coverage for an employee driving a co-worker's car, stating that "Where provisions of a contract of insurance are reasonably susceptible of more

than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured."

In *Decker v. CNA Ins. Co.*, 66 Ohio App.3d 576, 579, 585 N.E.2d 884, 886 (App. L), *discretionary appeal dismissed as improvidently allowed in* 61 Ohio St.3d 1201, 572 N.E.2d 689, the court stated as follows:

> The underlying issue in this case, which is the construction of an ambiguous insurance provision, has been the subject of considerable judicial scrutiny of late. Several courts, including this one, have addressed the question of who the insured party is in policies of uninsured/underinsured motorist coverage, where the form in question is used for both corporate and personal use. The interpretive difficulty in construing these provisions (which are all very similar to that in the case *sub judice*) is in construing phrases such as "you" or "a family member."

In fact, Judge Michael J. Corrigan of the Cuyahoga County Court of Appeals succinctly summarized the state of Ohio law on this issue when he stated as follows:

> As a matter of law, *Scott-Pontzer* applies retroactively as though the law pronounced in that case has always existed. See *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210, 129 N.E.2d 467; *Heiney v. Hartford*, Franklin App. No. 01-AP-220, 2002 Ohio 3718. This being the case, Oakar cannot rationally argue that she only became aware of the viability of her claim after *Scott-Pontzer* had been released. In *Gruelich v. The Hartford*, Cuyahoga App. No. 80987, 2002 Ohio 7229, we addressed this precise issue and held that a delay in waiting for a favorable decision does not constitute a reasonable excuse for failing to give notice of a claim. The law announced in *Scott-Pontzer* was in place in 1990, there for Oakar's taking. She chose not to file her claim then and waited ten years to do so. Under no stretch of the imagination could this be considered notice "as soon as possible."

Oakar v. St. Paul Fire & Marine Ins. Co., 2003 Ohio 552, (Ohio App. Cuyahoga Cty. Feb. 6, 2003) (emphasis added), Corrigan, J. dissenting opinion (App. M).

Therefore, as the Court can clearly see, significant Ohio authority existed long before the *Scott-Pontzer*

decision by the Ohio Supreme Court (including a prior decision by the Ohio Supreme Court in *King v. Nationwide*) establishing a *Scott-Pontzer* type theory of recovery on behalf of employees against their employer's commercial auto insurance contracts. Thus, the Sixth Circuit's affirmance on Rule 60(b)(6) grounds is clearly erroneous because there was no new theory of recovery.

III. The Sixth Circuit Improperly Granted Relief under Rule 60(b)(6).

A. The Sixth Circuit Erred In Holding That Rule 60(b)(6) Relief Was Proper Where Respondent's Claimed Relief falls under Other Categories of Rule 60, but Respondent does not meet their Criteria.

In *McCurry*, the court also acutely observed that the movant, like Respondent here, initially sought Rule 60(b) relief on the basis of subsection (b)(1) ("mistake, inadvertence, surprise, or excusable neglect"). However, that subsection did provide the opportunity for relief, but the court found that McCurry's "mistake" and "neglect" did not rise to a level warranting relief on 60(b)(1) grounds. Since relief was available under

subsection (b)(1), however, the Sixth Circuit appropriately in that case held that it was therefore precluded by subsection (b)(6) and (b)(6) was not properly exercised simply to afford movants a "second bite at the appeal apple." *Id.* at 593-94.

In Respondent's case, on the other hand, the lower court also found that Respondent's claimed relief properly fell under Rule 60 (b), but never discussed which subsection it fell under. The Sixth Circuit also failed to discuss subsection (b)(1) but rather held that subsection (b)(6) afforded relief because the "intervening change in law" was "exceptional." Opinion at A-5 to A-6.

This reasoning directly conflicts with the analysis of the Sixth Circuit Panel in *McCurry*, which stated as follows:

> . . .subsection (b)(6) of the Rule applies "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." (Citation omitted) Such situations are rare, "because almost every conceivable ground for relief is covered under the other subsections of Rule 60(b). (Citation omitted).

> So it is here, where the grounds advanced by McCurry and Turner as justifying relief from the District Court's order of dismissal fit quite comfortably within the range of circumstances addressed in Rule 60(b)(1). To the extent that McCurry and Turner cite strategic misjudgments and flawed legal analysis by their counsel as bases for relief, these are most aptly termed "mistakes" – but not of a sort that would warrant relief under subsection (b)(1) of the Rule. Similarly, while McCurry and Turner fault their former counsel for failing to name Ms. Turner as a plaintiff, we have explained that this might well be characterized as "neglect," yet is not "excusable" within the meaning of Rule 60(b)(1).

298 F.3d 586, 595-96.

Likewise, the "mistake" in this case clearly does not rise to a level justifying relief under the Rule. The use of (b)(6) to "rectify" or "fill in" for (b)(1) "shortcomings" is improper and the Sixth Circuit Panel's decision against Petitioner West American in this case directly conflicts with the Sixth Circuit Panel's decision in *McCurry*. West American, therefore, respectfully requests assistance from the Supreme Court

since only this Court can remedy the conflict and accord Petitioner justice.

B. The Sixth Circuit's Decision Destroys The Principle Of "Finality" Upon Which Parties Should Be Able To Rely, Which only this Court can Remedy.

This is not a case where a defendant was not aware of a properly filed Complaint, failed to Answer in due course, and faced a default judgment. Rather, Respondents, as plaintiffs in a civil lawsuit, doggedly pursued this default judgment against the Tortfeasor for four months after the *Scott-Pontzer* decision was decided. Having obtained a ruling in their favor, they then allowed it to mature into a Final Judgment. It was only months later that Respondent filed for Rule 60(b) relief.

Therefore, not only is *Scott-Pontzer* a questionable decision in and of itself, but in this particular instance, the decision seeks to work additional harm by compromising the principle of finality upon which our judicial system depends.

CONCLUSION

In light of the importance of these issues, West American respectfully requests that the Court grant its Petition for Certiorari to the Sixth Circuit Court of Appeals.

APPENDIX

		Page
A.	Order of the U.S. Court of Appeals for the Sixth Circuit denying petition for rehearing en banc (Date: June 6, 2003)	A1-A1
B.	Opinion of the U.S. Court of Appeals for the Sixth Circuit (Date: May 5, 2003)	B1-B6
C.	Order of the U.S. District Court for the Southern District of Ohio Granting Rule 60(b) Relief (Date: July 17, 2001)	C1-C7
D.	District Court Final Judgment Decree (Date: October 18, 1999)	D1-D2
E.	Case Law	E-M

CERTIFICATE OF SERVICE

I, Michael M. Neltner, a member of the Bar of this Court, hereby certify that on this ____ day of July, 2003, three copies of the Petition of Writ of Certiorari in the above-titled case were mailed, first class postage prepaid, to John H. Metz, Esq., 44th Floor Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202-3016, Benjamin M. Maraan, II, Esq., 5465 North Bend Road, Suite 333, Cincinnati, Ohio 45247, Counsel for all the respondents herein, and Soy Sok, #352-483, [COR LD NTC] [PRO SE], Noble Correctional Institution, 15708 State Route 78 West, Caldwell, Ohio 43724-8902. I further certify that all parties required to be served have been served.

Michael M. Neltner (0063555)
Thomas B. Bruns (0051212)
Counsel of Record
FREUND, FREEZE & ARNOLD
Fourth & Walnut Centre
105 East Fourth Street, Suite 1400
Cincinnati, Ohio 45202-4006
(513) 665-3500
(513) 665-3503 Fax
Email: mneltner@ffalaw.com
tbruns@ffalaw.com

Table of Appendix Contents

U.S. COURT OF APPEALS - 6TH CIRCUIT:

Order,
filed 6/6/03 ..... A1-A1

Opinion,
filed 5/5/03 ..... B1-B6

U.S. DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION :

Order,
filed 7/17/01 ..... C1-C7

Final Judgment,
filed 10/18/99 ..... D1-D2

CASE LAW:

Scott-Pontzer v. Liberty Mutual Fire In. Co., 710 N.E.2d 1116, 1999 Ohio LEXIS 1754 ..... E1-E19

Ezawa, et al. v. Yasuda Fire & Marine Ins. Co. of America, 715 N.E. 2d 1142, 1999 Ohio LEXIS 2931 ..... F1-F4

The Peerless Electric Co. v. Bowers, Tax Commr.; et al., 129 N.E.2d 467, 1955 Ohio LEXIS 633, 57 Ohio Op. 411 ..... G1-G4

McCurry v. Adventist Health System/ Sunbelt, Inc., 298 F.3d 586, 2002 U.S. App. LEXIS 15470 ..... H1-H31

Government Financial Services One Limited Partnership v. Peyton Place, Inc., 62 F.3d 767, 1995 U.S. App. LEXIS 25273 ..... I1-I23

Achauer, et al. v. Monroe Guaranty Ins. Co.; et al., 2001 Ohio App. LEXIS 2985 ..... J1-J8

King, Exr., v. Nationwide Ins. Co., 519 N.E.2d 1380; 1988 LEXIS 46 ..... K1-K19

Decker, Exrx, et al. v. CNA Insurance Co., et al., 585 N.E.2d 884, 1990 Ohio App. LEXIS 2145 ..... L1-L13

Carol Oakar, et al. v. St. Paul Fire & Marine Insurance Co., 2003 Ohio 552, 2003 Ohio App., LEXIS 555 M1-M22 ..... M1-M22

CASE Nº 01-3893
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Kevin G. Jackson, Individually and in His Representative Capacity as Administrator of The Estate of Paula Kay Jackson, and as Personal Representative of her Next of Kin and Beneficiaries, *Plaintiffs-Appellees,*	)	**ORDER**
v.	)	
Soy Sok, and Allstate Insurance Company, *Defendants,* and West American Insurance Company, *Intervenor/Defendant-Appellant.*	)	

Upon consideration of the untimely petition for rehearing en banc from intervenor-appellant.

It is ORDERED that the petition not be accepted for filing.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN

CASE Nº 01-3893
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Kevin G. Jackson, Individually and in His Representative Capacity as Administrator of The Estate of Paula Kay Jackson, and as Personal Representative of her Next of Kin and Beneficiaries, *Plaintiffs-Appellees,* v. Soy Sok, and Allstate Insurance Company, *Defendants,* and West American Insurance Company, *Intervenor/Defendant-Appellant.*	On Appeal From The United States District Court For The Southern District of Ohio

Before: SILER and **BOGGS**, Circuit Judges; **STEEH**, District Judge.*

PER CURIAM. Intervenor-defendant West American Insurance Company ("WAI"), a subsidiary of Ohio Casualty Group, appeals the district court's decision to grant

---

* The Honorable George Caram Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

plaintiffs' amended Rule 60(b) motion to set aside a default judgment rendered against defendant Soy Sok and the plaintiffs' uninsured motorist carrier, Allstate Insurance Company ("Allstate"). For the reasons set forth below, we **AFFIRM** the judgement of the district court.

Background

Paula Jackson was struck and killed by an automobile driven by Sok, an uninsured motorist. The decedent's husband, Kevin Jackson, on behalf of Paula's estate, subsequently filed this wrongful death suit against Sok. Sok failed to file an answer to the complaint or respond to the plaintiffs' numerous discovery requests. As a consequence, Jackson also sought recovery from his uninsured motorist policy through Allstate.

On June 15, 1999, Jackson filed a motion for default judgment against Sok pursuant to Fed. R. Civ. P. 55(a). The motion was granted by order dated October 18, 1999. The court indicated that damages against Sok approximated $500,000, but entered judgment in the amount of $100,000 plus costs and interest because this was the maximum amount of Jackson's coverage with Allstate. Default judgment against Sok was entered the same day.

Less than one year later, on October 5, 2000, Jackson filed a Rule 60(b) motion for relief from default against Sok. He asked the court to set aside the earlier judgment so that he could amend his complaint and seek additional insurance proceeds under an uninsured motorist policy which his employer, Hater Industries, had with WAI at the time his wife was killed. The claim against WAI was to be premised upon alleged changes in Ohio law that were unknown to Jackson's

counsel at the time default judgment was entered.

Jackson relies on two recent Ohio Supreme Court cases – *Scott Pontzer v. Liberty Mutual Fire Insurance Company*, 710 N.E.2d 1116, decided on June 23, 1999, and *Ezawa v. Yasuda Fire & Marine Insurance Company of America*, 715 N.E.2d 1142, decided on September 22, 1999 – to support his claim to coverage under the WAI uninsured motorist policy. *Scott-Pontzer*, decided eight days after Jackson filed his motion for default judgment, held that when an employer's uninsured motorist coverage names the corporate entity as the insured to include "you," the policy should be interpreted to extend insured status to the employees of the corporation. In *Ezawa*, the state supreme court extended insured status under *Scott-Pontzer* to cover family members of corporate employees, such as Mrs. Jackson.

The district court permitted WAI to intervene to defend against Jackson's Rule 60(b) motion and, on July 17, 2001, granted Jackson's motion to set aside the default judgment. The district court reasoned that the *Scott-Pontzer* and *Ezawa* cases reflected an unusual change in Ohio law, which warranted setting aside the earlier default judgment.

Discussion

A. Standing

As an initial matter, Jackson argues that WAI lacks standing to appeal the decision below since it was not bound by the original default judgment. We disagree. Where the intervenor-defendant's own interests have been adversely affected by a judgment, it has standing on appeal even if it

would have lacked standing to sue in the underlying matter. *See Ass'n of Banks in Ins. v. Duryee* , 270 F.3d 397, 403-04 (6th Cir. 2001).

Permission to intervene in a district court action does not confer standing on appeal. *Diamond v. Charles*, 476 U.S. 54, 68 (1986). However, an intervenor may appeal from a district court decision in absence of the party on whose side intervention was permitted "upon a showing by the intervenor that [it] fulfills the requirements of Art. III." *Id.*; *Duryee*, 270 F.3d at 403. Article III standing requires the party allege an injury-in-fact that is fairly traceable to the challenged conduct and likely to be redressed by a favorable court decision. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

In the present case, WAI has an interest in maintaining finality of the default judgment because there is a strong probability that it will suffer economic injury if the default judgment is set aside. Specifically, WAI would be required to defend against Jackson's amended claim and, if Jackson were to prevail, it would be liable to Jackson for damages that exceed the initial $100,000 recovery. Though this injury is indirect, it is "distinct" and "palpable," traceable to the Rule 60(b) motion, and capable of redress by this court. *See Jet Courier Serv. Inc. v. Federal Reserve Bank of Atlanta* , 713 F.2d 1221 (6th Cir. 1983) (holding that an indirect injury does not necessarily deprive litigant of standing). Therefore, WAI has standing to appeal.

B. Rule 60(b) Motion

The district court granted relief pursuant to Rule 60(b)(6), which provides that a court may set aside a final judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence. . .; (3) fraud . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated. . .; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). Rule 60(b)(6) allows the court to set aside a judgment to accomplish justice in "exceptional or extraordinary circumstances which are not addressed in the first five numbered sections of the rule." *See McDowell v. Dynamics Corp. Of Am.*, 931 F.2d 380, 383 (6th Cir. 1991). The district court found exceptional the intervening change of law that resulted from the *Scott-Pontzer* and *Ezawa* decisions.[1] Although a change in law rarely constitutes an "extraordinary circumstance" justifying Rule 60(b)(6) relief, *Blue Diamond Coal Co. v. Tr. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001), the district court did not abuse its discretion in granting the motion.

---

[1] WAI argues that the Ohio Supreme Court did not announce a "change in the law," but rather clarified existing law – that ambiguous contracts are to be strictly construed against the insurer. WAI is correct insofar as the state court employed a well-established rule of construction to construe the contracts at issue against the insurer. However, there is no indication that the *Scott-Pontzer* theory of recovery preexisted the district court's decision. Thus, although the *Scott-Pontzer* decision did not involve a change in the law in the sense of a reversal, it created a new theory of recovery.

This case is analogous to the *Cincinnati Insurance Company v. Byers*, 151 F.3d 574 (6th Cir. 1998), where we held that the district court erred in not granting the plaintiff's Rule 60(b)(6) motion due to an intervening change in law. Here, as in *Byers*, the change in law occurred after the filing of the motion but before the court ruled on the matter. *Id.* at 580. Thus, this is not an attempt to use a Rule 60(b)(6) motion as a substitute for an appeal following a subsequent change in the law. *See Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989) (disapproving of the use of Rule 60(b)(6) to gain a second chance at an appeal).

Furthermore, the district court properly considered equitable factors set forth in *United Coin Meter Co., Inc., v. Seaboard Coastline R.R.*, 705 F.2d 839, 844 (6th Cir. 1983). Having found no evidence that Jackson either intended to thwart judicial proceedings or acted with disregard for the effect of its conduct, *Thompson v. Am. Home Assurance Co.*, 95 F.3d 429, 432 (6th Cir. 1996), we agree with the district court that the entry of default was not the result of willful or culpable conduct. In fact, the record suggests that Jackson remained unaware of the intervening change in law and, upon discovering the *Scott-Pontzer* and *Ezawa* decisions, took steps to ensure that his claim was meritorious prior to moving to set aside the default judgment. Furthermore, WAI has failed to demonstrate that it will be prejudiced by loss of evidence or suffer other tangible harm if the default judgment is set aside.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KEVIN JACKSON, et al.,

Plaintiffs,

v. C-1-98-440

SOY SOK, et al.,

Defendants.

ORDER

This matter is before the Court upon plaintiffs' Amended 60(b) Motion (doc. 43), intervenor-defendant Ohio Casualty Group's opposing memorandum (doc. 45), plaintiff's reply (doc. 46), and the parties' supplemental filings (docs. 49, 50, 54).

Plaintiffs are the spouse and children of decedent Paula Jackson. Decedent died from injuries sustained when she was struck by a car driven by defendant Soy Sok, an uninsured motorist. Plaintiffs filed suit against Sok and Allstate Insurance Company, plaintiff Kevin Jackson's uninsured motorist carrier. Service was perfected on all defendants. Sok, who was incarcerated, did not respond or file an answer to the complaint.

On March 31, 1999, the Court issued a Declaratory Judgment declaring that defendant Allstate's obligation to plaintiffs under the terms of the policy with Allstate was

$50,000. The case remained pending on plaintiffs' claims against defendant Sok. On June 15, 1999, plaintiffs moved the court for an entry of default judgment against defendant Sok pursuant to Fed. R. Civ. P. 55(a). The Court granted the motion by Order dated October 18, 1999. The Court found that plaintiffs' damages against defendant Sok exceeded the amount of $100,000, plus interest and costs. Default judgment against Sok was entered that same date.

On October 5, 2000, plaintiffs filed a Rule 60(b) motion for relief from the default judgment (doc. 34). Plaintiffs asked for relief from the judgment to enable them to pursue a claim for insurance proceeds under a policy which plaintiff Kevin Jackson's employer, Hater Industries (Hater), had with Ohio Casualty Group (OCG). OCG filed a motion to intervene on October 17, 2000 (doc. 35). The Court granted the motion. Plaintiffs subsequently filed an amended Rule 60(b) motion on January 29, 2001. The Court held an oral hearing on the motion on May 22, 2001. The parties have submitted supplemental filings addressing issues raised at the hearing.

Plaintiffs seek relief from the default judgment based on alleged changes in Ohio law of which plaintiffs' counsel first became aware in January, 2000. Plaintiffs rely on two 1999 Ohio Supreme Court decisions, ***Scott-Pontzer v. Liberty Mutual Fire Insurance Company,*** 85 Ohio St.3d 660, 710 N.E.2d 1116 (1999), decided on June 23, 1999, and ***Ezawa v. Yasuda Fire & Marine Insurance Company of America,*** 86 Ohio St.3d 557, 715 N.E.2d 1142 (1999), decided on September 22, 1999. In the ***Scott-Pontzer*** case, the Ohio Supreme Court held that when an employer's insurance policy for underinsured/uninsured motorist coverage names the corporate entity as the insured and defines insured to include

"you", the policy should be interpreted to extend insured status to employees of the corporation. In ***Ezawa***, the Court reversed an appellate court decision on the authority of ***Scott-Pontzer*** and found that the son of a corporation's employee was covered by the corporation's underinsured/uninsured motorist policy for injuries sustained in a motor vehicle accident. Plaintiffs allege that under the law as set forth in these cases, they are entitled to coverage under the underinsured/uninsured motorist policy which Hater had with OCG at the time of the decedent's death.

Plaintiffs assert that they did not discover Hater's policy until after default judgment had been entered. Plaintiffs' counsel asserts that on January 31, 2000, he contacted Hater and requested copies of any policies in existence at the time of Paula Jackson's death in light of the possibility that her husband might be entitled to make a claim as an insured. Hater responded through its plant manager, Joseph Bickers, by letter dated February 16, 2001. In the letter, Bickers stated that the only insurance which Hater carried on Mr. Jackson was a $7,000.00 life insurance policy. On that same date, counsel submitted another request for copies of Hater policies by fax and asked that Hater have its counsel contact him if Hater would not provide the policies. Hater did not subsequently contact counsel. Approximately two months later, in mid April, representatives from Hater filed a claim on behalf of Kevin Jackson. Plaintiffs claim that it was not until after Hater had filed a claim on behalf of Mr. Jackson with OCG under its corporate automobile policy that it appeared that Mr. Jackson had a valid claim under that policy.

Plaintiffs request relief from the default judgment so that they can seek all of the recoverable insurance benefits

under Hater's policy with OCG and any additional policies held by Hater. Plaintiffs allege that setting aside the default judgment would not be prejudicial to OCG, they have a meritorious claim under Ohio law, and they did not engage in culpable conduct.

Intervenor-defendant OCG argues that plaintiffs' motion should be denied because the cases on which plaintiffs rely did not change the law. Rather, OCG contends that ***Scott-Pontzer*** simply recognized the long-standing proposition that ambiguous insurance contracts are to be strictly construed against the drafter and in favor of the insured. OCG further asserts that plaintiffs should have been aware of any changes in the law wrought by the Ohio Supreme Court decisions before they moved to obtain a default judgment against Sok or while the motion was pending. OCG alleges that plaintiffs' failure to take action based on the alleged change in the law before default judgment was entered constitutes inexcusable neglect, which is not a valid justification for setting aside a default judgment. OCG also contends that it would be prejudiced by a decision to overturn the default judgment because it did not become aware of this lawsuit until after default judgment had been entered and the amount of damages had been determined.

OCG also submits that it did not act improperly in responding to counsel's request for information regarding insurance coverage provided to Hater Industries. OCG has submitted an affidavit of Mr. Bickers in which he states that at the time he wrote the letter to plaintiffs' counsel, it was his understanding that Hater had a commercial general liability policy which provided coverage to employees only if they were engaged in work-related activities.

Standard of Review

Fed. R. Civ. P. 55 provides that,

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 60(b) lists six bases for setting aside a final judgment: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

The decision to grant or deny a Rule 60(b) motion is discretionary. ***Amernational Industries, Inc. v. Action-Tungsram, Inc.,*** 925 F.2d 970, 976 (6th Cir. 1991). In determining whether to set aside entry of a judgment of default under Rule 60(b), the Court must apply Rule 60(b) "equitably and liberally . . . to achieve substantial justice." ***Id.*** (***citing United Coin Meter v. Seaboard Coastline RR,*** 705 F.2d 839, 845 (6th Cir. 1983)). The Court must consider equitable factors under Rule 55 and determine whether one of the specific requirements of Rule 60(b) is met. ***Thompson v. American Home Assurance Company,*** 95 F.3d 429, 433 (6th Cir. 1996) (citations omitted).

Opinion

The Court finds that this case presents unique and extraordinary circumstances which warrant setting aside the default judgment. First, the Court finds that the ***Scott-Pontzer*** decision constitutes new law in view of the fact that there was no prior caselaw interpreting an employer's insurance policy for underinsured/uninsured motorist coverage to cover an employee or an employee's family member who was injured in a non-work related automobile accident. Setting aside the default judgment would enable plaintiffs to pursue all insurance proceeds to which they may arguably be entitled under Ohio law as set forth in the ***Scott-Pontzer*** and ***Ezawa*** decisions.

Second, although the decisions on which plaintiffs rely were issued prior to entry of the default judgment, there is no indication that plaintiffs acted in bad faith by failing to bring those decisions to the Court's attention until after default judgment had been entered. Rather, it appears that counsel simply remained unaware of the decisions for some time after they were issued. Plaintiff's lack of diligence does not preclude setting aside a default judgment which they themselves sought against a defendant other than OCG.

Finally, OCG has not shown that it will be prejudiced if the default judgment is set aside. OCG does not allege, and it does not appear, that the passage of time will hamper its ability to defend plaintiffs' claims against it. Moreover, OCG has failed to show that it would be prejudiced by a decision to overturn the default judgment because it did not become aware of this lawsuit until after the default judgment had been entered and the amount of damages had been determined. A review of the transcript of the default hearing discloses that

although plaintiffs' damages exceeded $100,000, the Court did not determine the exact amount of damages before issuing the default judgment. Rather, the Court entered a default judgment in the amount of $100,000 in order to accommodate the parties' desire to expeditiously resolve plaintiffs' claims against defendant Allstate in the district court and allow plaintiffs to continue on to the Court of Appeals. The amount of plaintiffs' damages is an issue that will be reopened upon the setting aside of the default judgment. OCG will therefore not be prejudiced by a decision to overturn the default judgment.

Conclusion

The Court exercises its discretion to set aside the default judgment against defendant Sok. New developments in Ohio law pursuant to which plaintiffs may be entitled to additional insurance benefits, the circumstances surrounding entry of the default judgment, and the lack of prejudice to OCG justify setting aside the default judgment. Plaintiffs' amended 60(b) motion is therefore **GRANTED**. The default judgment against defendant Sok is **VACATED**. This case remains pending against defendant Sok and intervenor-defendant OCG.

IT IS SO ORDERED.

/S/ HERMAN J. WEBER
HERMAN J. WEBER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KEVIN JACKSON, et al.,

Plaintiff(s),

v. **C-1-98-440**

SOY SOK, et al.,

Defendant(s).

FINAL JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that Plaintiff's motions for entry of default (doc. 19), for default judgment (doc. 20); and for order deeming requests for admissions admitted (doc. 21) are **GRANTED** as to defendant Soy Sok in the amount of $100,000 plus interest and costs pursuant to order of this Court (see doc. 17).

Defendant Allstate Insurance Company is liable to plaintiff for up to $50,000 of that amount, plus interest and costs. Case is **TERMINATED** on the docket of this Court.

October 18, 1999

Kenneth Murphy, Clerk

/S/ KENNETH MURPHY

Deputy Clerk

85 Ohio St.3d 660, *; 1999 Ohio 292;
710 N.E.2d 1116, **; 1999 Ohio LEXIS 1754, ***

LEXSEE 85 ohio st.3d 660

Scott-Pontzer,
Appellant,
v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY, et al.,
APPELLEES.

No. 98-442

SUPREME COURT OF OHIO

85 Ohio St. 3d 660; 1999 Ohio 292; 710 N.E.2d 1116; 1999 Ohio LEXIS 1754

December 16, 1998, Submitted

June 23, 1999, Decided

SUBSEQUENT HISTORY:
As Amended September 15, 1999.

PRIOR HISTORY:
[***1] Appeal from the Court of Appeals for Stark County, No. 1997CA00152.

On July 10, 1994, Christopher T. Pontzer was driving an automobile owned by his wife, Kathryn Scott-Pontzer,

appellant. Pontzer was killed when the vehicle he was driving collided with a motor vehicle driven by Troy W. Taylor. The collision was caused by the negligence of Taylor. Taylor was insured under a policy of automobile liability insurance with limits of $ 100,000 per person and $ 300,000 per accident.

Before his death, Pontzer was an employee of Superior Dairy, Inc. At the time of the accident, Superior Dairy was insured under a policy of commercial automobile liability insurance with Liberty Mutual Fire Insurance Company ("Liberty Fire"). Superior Dairy's policy of insurance with Liberty Fire contained a provision for underinsured motorist coverage. In addition to the liability policy provided by Liberty Fire, Superior Dairy also had in effect at the time of Pontzer's death an "umbrella/excess" insurance policy with Liberty Mutual Insurance Company ("Liberty Mutual").

On July 9, 1996, appellant brought, in the Court of Common Pleas of Stark County, an action as surviving spouse and executor of her husband's [***2] estate against Liberty Fire and Liberty Mutual. In the complaint appellant alleged that because her husband was an employee of Superior Dairy, she was entitled to the underinsured motorist benefits under Superior Dairy's automobile liability policy with Liberty Fire. Appellant also contended that she was entitled to any benefits accruing under Superior Dairy's umbrella policy with Liberty Mutual. On April 16, 1997, the trial court granted summary judgment in favor of Liberty Fire and Liberty Mutual. The trial court determined that, according to the policy language of the Liberty Fire policy, Pontzer was not a named insured and

was not operating a "covered" automobile. The trial court further found that, for purposes of the Liberty Fire policy, no "insured" sustained "bodily injuries." Thus, the trial court concluded that appellant was not entitled to underinsured motorist benefits from Superior Dairy's commercial liability policy with Liberty Fire. The trial court also concluded that appellant's husband was not an executive officer, director, stockholder, or an employee acting within the scope of his employment, and thus he was not an insured according to the terms of Superior Dairy's [***3] umbrella policy. The trial court therefore held that appellant did not qualify for benefits under Superior Dairy's umbrella/excess insurance policy issued through Liberty Mutual.

On appeal, the court of appeals affirmed the judgment of the trial court, but based its decision on different reasons than those of the trial court. Specifically, the court of appeals determined that the policies in question were "ambiguous as to the 'insureds' under the underinsured motorist coverages." n1 The court of appeals concluded that, pursuant to our decision in *King v. Nationwide Ins. Co. (1988), 35 Ohio St. 3d 208, 519 N.E.2d 1380,* Pontzer, as an employee of Superior Dairy, was an insured under the policies issued by Liberty Fire and Liberty Mutual for purposes of underinsured motorist coverage. The court of appeals, however, held that underinsured motorist coverage under a corporate policy is available only to those employees injured while acting within the scope of their employment. Thus, the court of appeals concluded that since appellant's husband was not within the scope of his employment when the accident occurred, underinsured

motorist coverage was not available to appellant under the policies [***4] issued to Superior Dairy.

> n1 This language is slightly in error, since "underinsured motorist coverage" was not provided in the Liberty Mutual umbrella policy. In determining whether the decedent was an insured under the policies at issue, the court of appeals looked to the declarations page of both the Liberty Fire and the Liberty Mutual policies. The court of appeals noted that there was no declarations page for uninsured/underinsured motorist coverage in the Liberty Mutual umbrella/excess insurance policy because such coverage was not offered. The court of appeals correctly determined, and Liberty Mutual conceded, that such coverage was part of the umbrella/excess policy by operation of law pursuant to *R.C. 3937.18*.

This matter is now before this court pursuant to the allowance of a discretionary appeal.

DISPOSITION:
Judgment reversed and cause remanded.

COUNSEL:
John S. Coury, for appellant.

Jan A. Saurman Law Offices and John V. Rasmussen, for appellees.

Allen Schulman, Jr. and Christopher J. Van Blargan, urging reversal for amicus curiae, Ohio Academy of Trial Lawyers.

JUDGES:
DOUGLAS, J. RESNICK, F.E. SWEENEY and PFEIFER, [***5] JJ., concur. MOYER, C.J., and COOK, J., dissent. LUNDBERG STRATTON, J., dissents. MOYER, C.J., concurs in the foregoing dissenting opinion.

OPINIONBY:
DOUGLAS

OPINION:

[**1118] [*662]

DOUGLAS, J. The parties present us with three issues for our determination. The first issue is whether Pontzer, as an employee of Superior Dairy, was an "insured," for purposes of underinsured motorist coverage, under the policies issued to Superior Dairy by Liberty Fire and Liberty Mutual. If he was, then the second issue is whether Pontzer, for coverage to be afforded, would have had to be in the course of his employment at the time of the accident. The third question, which pertains only to the Liberty Mutual policy, is whether, after underinsured motorist coverage is inserted into a policy by operation of law, the exclusions in the policy that have been written in so as to apply to the coverage for liability also pertain to the underinsured coverage.

If we find Pontzer was not an insured under the policies, then our inquiry is at an end. If we find that he was an insured, then we must proceed to the question of "scope of employment." If we find that for Pontzer to be covered he must have been in the scope of his employment, [***6] again our inquiry is at an end because it is stipulated that he was not. If, however, we find that Pontzer was an insured and that coverage ensued even though he was not in the course of his employment [*663] at the time of the occurrence of the accident, then our inquiry as to coverage under the Liberty Fire policy is ended (there would be coverage) and we then must proceed to whether Pontzer was also covered under the Liberty Mutual policy given that there is, in that policy, a "scope of employment" requirement.

In discussing the foregoing, hereinafter "Liberty Fire" and "Liberty Mutual" will also be referred to jointly as "appellees," since they submitted a joint brief to this court.

I. Liberty Fire Policy

In regard to the commercial automobile liability policy issued through Liberty Fire, appellees argue that the court of appeals erred in concluding that Pontzer was an insured. Appellees contend that the Liberty Fire policy unambiguously shows that Superior Dairy was the only named insured, that Pontzer could not be considered an insured under any language in the policy, and that, therefore, appellant cannot claim entitlement to underinsured motorist benefits. We disagree. [***7]

Regrettably, as so many of these types of cases do, this issue centers on construing certain words and phrases contained within the Liberty Fire policy. The declarations page of the Liberty Fire policy names Superior Dairy, Inc. as the named insured. The business auto coverage form of that policy states that "throughout this policy the words you and your refer to the named insured shown in the declarations." The policy also contains an Ohio uninsured motorist coverage form that defines an "insured" for purposes of underinsured motorist coverage as follows:

"B. Who Is An Insured

"1. You.

"2. If you are an individual, any family member.

"3. Anyone else occupying a covered auto or a temporary substitute for a covered auto. The covered auto must be out of service because of its breakdown, repair, servicing, loss or destruction.

[**1119] "4. Anyone for damages he or she is entitled to recover because of bodily injury sustained by another insured."

It is well settled that an insurance policy is a contract and that the relationship between the insured and the insurer is purely contractual in nature. *Nationwide Mut. Ins. Co. v. Marsh (1984), 15 Ohio St. 3d 107, 109, 15 Ohio B. Rep. 261, 262, 472* [***8] *N.E.2d 1061, 1062.* Appellees contend that the above-quoted policy language indicates the intent of the parties to the insurance contract to provide that Superior Dairy is the only named insured.

According to appellees, the inclusion [*664] of the phrase "if you are an individual, any family member" removes any doubt that "you" refers to Superior Dairy and, thus, that Superior Dairy is the sole named insured. In other words, appellees contend that by the insertion of this conditional language a distinction is made between "you" and an "individual," thereby clearly evincing the intent of the parties that the corporate entity, Superior Dairy, be the sole named insured. While that is one interpretation of the policy, it is not the only interpretation.

In *King, 35 Ohio St. 3d 208, 519 N.E.2d 1380,* syllabus, Chief Justice Moyer, speaking for the court, said that "where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." The language of the Liberty Fire policy under consideration here is, in our view, subject to various interpretations. [***9]

Contrary to appellees' contentions, the policy language of the Liberty Fire policy can be interpreted to include company employees. Assuming *arguendo* that "you" does refer solely to Superior Dairy, this does not foreclose the inclusion of Pontzer as an insured under the policy. We note again, as we have often in the past, that uninsured motorist coverage, mandated by law pursuant to *R.C. 3937.18*, was designed by the General Assembly to protect persons, not vehicles. *Martin v. Midwestern Group Ins. Co. (1994), 70 Ohio St. 3d 478, 639 N.E.2d 438,* paragraph one of the syllabus. Since *R.C. 3937.18* mandates underinsured as well as uninsured motorist coverage, obviously the same rationale applies to underinsured

motorist coverage. It would be contrary to previous dictates of this court for us now to interpret the policy language at issue here as providing underinsured motorist insurance protection solely to a corporation without any regard to persons. See *Ady v. W. Am. Ins. Co. (1982), 69 Ohio St. 2d 593, 23 Ohio Op. 3d 495, 433 N.E.2d 547.* Rather, it would be reasonable to conclude [***10] that "you," while referring to Superior Dairy, also includes Superior's employees, since a corporation can act only by and through real live persons. It would be nonsensical to limit protection solely to the corporate entity, since a corporation, itself, cannot occupy an automobile, suffer bodily injury or death, or operate a motor vehicle. Here, naming the corporation as the insured is meaningless unless the coverage extends to some person or persons -- including to the corporation's employees.

We recognize that insurers can draft policy language that provides varying arrays of coverage to any number of individuals. However, in drafting contracts of insurance, insurers must do so with language that is clear and unambiguous and that comports with the requirements of the law. See *King, 35 Ohio St. 3d 208, 519 N.E.2d 1380,* and *Martin, 70 Ohio St. 3d 478, 639 N.E.2d 438.* [*665]

We therefore agree with the court of appeals that the language in the Liberty Fire policy concerning the identity of "insureds" is ambiguous. Courts universally hold that policies of insurance, which are in language selected by the insurer and which are reasonably open to different interpretation, will be construed [***11] most favorably to the insured. Further, as we said in *Faruque v. Provident Life & Acc. Ins. Co. (1987), 31 Ohio St. 3d 34, 31 Ohio B.*

Rep. 83, 508 N.E.2d 949, syllabus, "language in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer." (Citation omitted.) Accordingly, we conclude that Pontzer, at the time of his death, was an insured under the Liberty Fire policy for purposes of underinsured motorist coverage.

[**1120] II. Liberty Mutual Policy

We also conclude that Pontzer was an insured under the umbrella/excess policy issued to Superior Dairy through Liberty Mutual. Liberty Mutual failed to offer uninsured/underinsured motorist coverage under Superior Dairy's umbrella/excess insurance policy. Thus, unlike the Liberty Fire policy, the Liberty Mutual umbrella policy did not contain an uninsured motorist coverage form that defined insureds for purposes of underinsured motorist coverage.

In *Duriak v. Globe Am. Cas. Co. (1986), 28 Ohio St. 3d 70, 72, 28 Ohio B. Rep. 168, 170, 502 N.E.2d 620, 622-623,* we held that excess liability insurance must comport with *R.C. 3937.18* [***12] and thus uninsured (and underinsured) motorist coverage must be tendered. Further, in *Gyori v. Johnston Coca-Cola Bottling Group (1996), 76 Ohio St. 3d 565, 568, 669 N.E.2d 824, 827,* we stated that failure by the insurer to offer such coverage results in the provision of such coverage by operation of law. Absent any showing that underinsured coverage was offered and rejected, such coverage is included in the policy. Therefore, we conclude that Pontzer, as an employee of Superior

Dairy, was also an insured under Superior Dairy's umbrella/excess insurance policy and that said policy includes underinsured motorist coverage, as such coverage is mandated by operation of law.

III. Scope of Employment

Having concluded that Pontzer was an insured under both policies at issue, we must now determine whether appellant is entitled to underinsured motorist benefits. Appellant argues that the court of appeals erred when it determined that underinsured motorist benefits under both the Liberty Fire and Liberty Mutual policies would only be available to appellant only if her husband was acting during the scope of his employment when he was killed. We agree with appellant.

In *King v. Nationwide* [***13] *Ins. Co., 35 Ohio St. 3d at 214, 519 N.E.2d at 1386,* we noted that "in the construction of insurance contracts, 'where exceptions, [*666] qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof.' " (Quoting *Home Indemn. Co. v. Plymouth [1945], 146 Ohio St. 96, 32 Ohio Op. 30, 64 N.E.2d 248,* paragraph two of the syllabus.) The Liberty Fire policy contains no language requiring that employees must be acting within the scope of their employment in order to receive underinsured motorist coverage. Thus, we find that appellant is entitled to underinsured motorist benefits under the Liberty Fire policy.

On the other hand, Liberty Mutual's umbrella/excess insurance policy did restrict coverage to employees acting within the scope of their employment. However, we have already found that Liberty Mutual had failed to offer underinsured motorist coverage through the umbrella policy issued to Superior Dairy. Thus, any language in the Liberty Mutual umbrella policy restricting insurance coverage was intended to apply solely to excess [***14] *liability* coverage and not for purposes of underinsured motorist coverage. See, *e.g., Demetry v. Kim (1991), 72 Ohio App. 3d 692, 698, 595 N.E.2d 997, 1001.* Therefore, there is no requirement in the umbrella policy that Pontzer had to be acting during the scope of his employment to qualify for underinsured motorist coverage. Therefore, appellant is entitled to underinsured motorist benefits under the Liberty Mutual umbrella policy as well.

IV.

We realize that the conclusion reached herein may be viewed by some as a result that was not intended by the parties to the insurance contracts at issue. Nonetheless, we believe that to adopt appellees' position in this matter would clearly produce absurd results. For instance, appellees' position is that only those employees occupying a "covered auto" are insureds under the Liberty Fire policy. Appellees' attorney conceded during oral argument that this position precluded coverage for employees driving their personal motor vehicles while acting during the scope of their employment. As a result, through the doctrine of *respondeat superior*, [**1121] Superior Dairy would be

potentially liable, without the protections afforded by automobile [***15] liability insurance (not to mention uninsured/underinsured motorist coverage), for tortious conduct by such employees. It could hardly have been the intent of Superior Dairy to place itself in such a precarious position. In any event, as the law is clear in this regard, we will not guess at the intent of the parties to the insurance contract when the insurer introduces ambiguous terms into the policy.

Accordingly, we reverse the judgment of the court of appeals and we vacate the judgment of the trial court. We remand this matter to the trial court with [*667] instructions to enter judgment in favor of appellant on the issue of coverage as to both policies.

Judgment reversed and cause remanded.

RESNICK, F.E. SWEENEY and PFEIFER, JJ., concur.

MOYER, C.J., and COOK, J., dissent.

LUNDBERG STRATTON, J., dissents.

DISSENTBY:
COOK

DISSENT:

COOK, J., dissenting. I differ with the majority's UIM coverage analysis as to both policies. As to the commercial automobile policy, I would hold that it covers Superior Dairy's insurable interests. As to the excess policy, I would hold that even if UIM coverage is deemed provided by

operation of law, it is provided to the named insured, Superior Dairy, [***16] but not to its off-duty employee.

The Commercial Auto Policy

Despite the named insured ("you") being Superior Dairy, the majority finds coverage for an off-duty employee driving his wife's car by saying that because UIM coverage protects persons and not vehicles, and because corporations cannot drive cars or sustain injuries, UIM coverage cannot protect a corporate entity. But, of course, a corporate entity has insurable interests for which countless policies are issued every day. See, *e.g., Indemn. Ins. Co. of N. Am. v. Dow (C.A.6, 1949), 174 F.2d 168, 169-170,* citing *Wurzburg v. New York Life Ins. Co. (1918), 140 Tenn. 59, 203 S.W. 332* (manufacturing company had an insurable interest in the life of its manager). See, also, *R.C. 3911.091.* This concept of Superior Dairy having corporate insurable interests defeats the majority's reasoning for extending coverage to the off-duty employee as an "insured." Though business entities like Superior Dairy operate through their employees, this employee was not acting for Superior Dairy at the time of this accident. So, there is no basis for saying he qualifies as an insured [***17] by virtue of his Superior Dairy employment.

Moreover, public policy would prevent Superior Dairy from validly insuring its business against damages to Scott-Pontzer's personal automobile, or insuring against Scott-Pontzer's liability arising outside the scope of Superior Dairy's business. As a matter of public policy, the validity of an insurance contract is dependent upon the insured

having an insurable interest in the subject of the insurance. 1 Holmes, Appleman on Insurance 2d (1996) 555-557, Section 4.32. See, also, *id.* at 11-15, Section 1.3; *Phillips v. Cincinnati Ins. Co. (1985), 60 Ohio St. 2d 180, 181,* [*668] *14 Ohio Op. 3d 413, 414, 398 N.E.2d 564, 565; Great Am. Ins. Co. v. Curl (App.1961), 88 Ohio L. Abs. 516, 517, 18 Ohio Op. 2d 481, 482, 181 N.E.2d 916, 918,* citing 30 Ohio Jurisprudence 2d (1958) 305, Insurance, Section 305. An insurable interest exists when "the insured derives pecuniary benefit or advantage by the preservation or continued existence of the property or will sustain pecuniary loss from its destruction." 4 Appleman, Insurance Law and Practice (1969) 35, Section 2123; *Phillips, 60 Ohio St. 2d at 182, 14 Ohio Op. 3d at 415, 398 N.E.2d at 566.* Here, Superior Dairy [***18] could incur no liability because of this employee's off-duty operation of his wife's car.

Thus, no legitimate reason supports the judgment of the majority that this policy covers this employee's injuries in this accident; Scott-Pontzer is not an "insured" under the commercial auto policy.

The Excess Policy

The majority's holding that the UIM coverage provided by operation of law in the Liberty Mutual excess policy covers this off-duty employee is likewise untenable. *R.C. 3937.18* mandates extension of UIM coverage [**1122] only to "insureds." *Martin v. Midwestern Group Ins. Co. (1994), 70 Ohio St. 3d 478, 481, 639 N.E.2d 438, 441.* Because Scott-Pontzer is not an "insured" under this policy, any

UIM coverage deemed provided by operation of law does not insure him for this accident, but would instead insure the named insured, Superior Dairy.

Conclusion

The effect of the majority opinion is to afford comprehensive automobile insurance coverage to any employee working for an employer prudent enough to insure itself. This cannot be what the majority means to do. I therefore respectfully dissent.

MOYER, C.J., concurs in [***19] the foregoing dissenting opinion.

LUNDBERG STRATTON, J., dissenting. Once again, a majority of this court has extended the reach of uninsured/underinsured motorist coverage as mandated by *R.C. 3937.18* and further eroded the contractual nature of the relationship between an insurer and insured. In order to categorize this decedent as an insured under his employer's commercial liability insurance policy, the majority finds ambiguity in the policy where I believe there, clearly, is none.

The majority reiterates the legal principle that an insurance policy is a contract and the relationship between an insurer and an insured is contractual. It is equally well settled that "contracts are to be interpreted so as to carry out the intent of parties, as that intent is evidenced by contractual language." *Skivolocki v. E. Ohio Gas Co. (1974), 38 Ohio St. 2d 244, 67 Ohio Op. 2d 321, 313 N.E.2d 374,* [*669] paragraph one of the syllabus.

Insurance coverage is determined by reasonably construing the contract " 'in conformity with the *intention* of the parties as gathered from the ordinary and commonly understood meaning of the language employed.' [***20] " (Emphasis added.) *King v. Nationwide Ins. Co. (1988), 35 Ohio St. 3d 208, 211, 519 N.E.2d 1380, 1383; Dealers Dairy Products Co. v. Royal Ins. Co. (1960), 170 Ohio St. 336, 10 Ohio Op. 2d 424, 164 N.E.2d 745,* paragraph one of the syllabus. Where the intent of the parties to a contract is evident from the clear and unambiguous language used, a court must not read into the contract a meaning not contemplated or placed there by an act of the parties to the contract. *Gomolka v. State Auto. Mut. Ins. Co. (1982), 70 Ohio St. 2d 166, 168, 24 Ohio Op. 3d 274, 276, 436 N.E.2d 1347, 1348.*

It appears from the overall policy that the company's general intent was to purchase a commercial automobile liability insurance policy to insure Superior Dairy as a legal entity against liability arising from the use of certain Superior Dairy vehicles. The fact that Superior Dairy is the only named insured indicates the parties' intention to insure the company, not the private lives and activities of its employees. Likewise, Liberty Mutual did not contemplate providing insurance coverage in circumstances not related to Superior Dairy.

The majority admits that its conclusion is one not intended by the parties [***21] to the insurance contracts at issue, and yet it proceeds to find ambiguity. There is nothing ambiguous in the Liberty Fire policy's definition of "insured" for purposes of underinsured motorist coverage. "Common words appearing in a written instrument will be

given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co. (1978), 53 Ohio St. 2d 241, 7 Ohio Op. 3d 403, 374 N.E.2d 146,* paragraph two of the syllabus. "You" unambiguously means the named insured, Superior Dairy. The policy definition of "insured" also states that if "you" is an individual, then a family member is also an insured. The ordinary and commonly understood meaning of individual is a single human being. This language is not susceptible of more than one interpretation. In this case, "you" is an entity, not an individual. Therefore, this subsection is inapplicable in this case. There is no ambiguity and no reason to resort to conjecture that "you" must include employees because a corporation acts by and through its employees, or that having a corporate insured is meaningless unless [***22] the coverage extends to some person or persons.

[**1123] *Assuming arguendo* that the decedent was a potential insured under the Liberty Fire policy for purposes of uninsured or underinsured motorist coverage, there can also be no coverage if the decedent was acting outside the scope of his employment. A *commercial* policy cannot be reasonably construed to provide uninsured or underinsured motorist coverage in the case of the personal, nonemployment-related [*670] activities of an employee. Neither party to the contract intended to provide free uninsured motorist coverage for employees' personal, nonemployment-related activities, regardless of individual risk factors such as driving records, other applicable personal insurance coverage, or evidence of insurability.

The insurance premium for such a policy would have to be adjusted to account for these additional risk factors. The company that provides, as a benefit of employment, automobile insurance for its employees' personal lives is rare.

The majority reasons that the policy contains no language requiring that employees be acting within the scope of their employment in order to receive underinsured motorist coverage. However, it is inherent [***23] that a commercial policy, purchased by and written for a corporation, applies to the corporate entity and those acting within the scope of employment for that entity. There is no language in the policy that would create a presumption that it applies in situations other than events relating to Superior Dairy and its operation. Here, the decedent was engaged in a personal, nonemployment-related activity in a noncovered vehicle. Coverage under a commercial liability policy cannot be extended in these circumstances. Common sense alone dictates that this was an extension of coverage that the parties did not contemplate, bargain for, rate, or purchase. Is the extension of liability coverage next?

Because contract law should control the interpretation of insurance policies, and because the intent of the parties remains the foundation of a contract, I cannot agree with the majority's conclusion. Superior Dairy and Liberty Mutual did not intend for the commercial policy at issue to provide uninsured/underinsured motorist coverage for the private activities of Superior's employees who were injured while outside the scope of their employment. Therefore, I respectfully dissent.

86 Ohio St. 3d 557, *; 1999 Ohio 124;
715 N.E.2d 1142, **; 1999 Ohio LEXIS 2931, ***

LEXSEE 86 Ohio St. 3d 557

EZAWA, A MINOR, et al.,
APPELLANTS,
v.
YASUDA FIRE & MARINE INSURANCE COMPANY OF AMERICA,
APPELLEE.

No. 98-1686

SUPREME COURT OF OHIO

86 Ohio St. 3d 557; 1999 Ohio 124; 715 N.E.2d 1142; 1999 Ohio LEXIS 2931

June 22, 1999, Submitted
September 22, 1999, Decided

SUBSEQUENT HISTORY:
[***1] As Amended December 30, 1999.

PRIOR HISTORY:
APPEAL from the Court of Appeals for Franklin County, No. 97APE10-1343.

86 Ohio St. 3d 557, *; 1999 Ohio 124;
715 N.E.2d 1142, **; 1999 Ohio LEXIS 2931, ***

HEADNOTES:

Automobile liability insurance -- Underinsured motorist coverage -- R.C. 3937.18 -- Scope of coverage of employer's commercial automobile liability policy for employee's child injured in an accident.

COUNSEL:

Schottenstein, Zox & Dunn, Kris M. Dawley and Edwin L. Skeens, for appellants.

Ulmer & Berne, L.L.P., Alexander M. Andrews and Margaret C. Bettendorf, for appellee.

JUDGES:

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER and COOK, JJ., concur. LUNDBERG STRATTON, J., dissents.

OPINION:

[**1143] [*558]

The discretionary appeal is allowed.

The judgment of the court of appeals is reversed on the authority of *Scott-Pontzer v. Liberty Mut. Fire Ins. Co. (1999), 85 Ohio St. 3d 660, 710 N.E.2d 1116.*

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER and COOK, JJ., concur.

LUNDBERG STRATTON, J., dissents.

DISSENTBY:
LUNDBERG STRATTON

DISSENT:

LUNDBERG STRATTON, J., dissenting. I respectfully dissent for the reasons set forth in my dissenting opinion in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co. (1999), 85 Ohio St. 3d 660, 667, 710 N.E.2d 1116, 1121.*

Koichiro Ezawa, a minor, was injured in an accident while a passenger in an automobile driven by Diedre Soler. Ezawa's damages exceeded the $ 250,000 per person limit of Soler's liability insurance [***2] policy. At the time of the accident, Ezawa's father, Fumiko Ezawa, was employed by Tomasco Mulciber, Inc. ("Tomasco"). Tomasco had a business automobile insurance policy issued by appellee Yasuda Fire & Marine Insurance Company of America ("Yasuda"). Although Ezawa was injured by a third party who was not a Tomasco employee and was not in a vehicle covered by Tomasco's insurance

policy, Ezawa and his father, nevertheless, made an underinsured motorists ("UIM") claim against the Yasuda policy issued to Fumiko Ezawa's employer.

The trial court granted Yasuda's motion for judgment on the pleadings because, based on the unambiguous language

in the Yasuda policy, Koichiro was not an "insured" as that term is defined in the policy. The court of appeals affirmed.

The Yasuda policy was issued to a corporation. According to the language of the policy, UIM coverage extends to family members of the insured *only* if the named insured is an individual. Here, it is not. Yet the majority applies its convoluted reasoning in *Scott-Pontzer* to once again extend the reach of UIM coverage. Now a corporate policy must afford UIM coverage to an employee's [*559] minor son who was injured by a non-employee [***3] while riding in a non-covered vehicle and whose injuries had nothing to do with the corporation's business.

Pandora's Box continues to release its contents.

164 Ohio St. 209, *; 129 N.E.2d 467, **;
1955 Ohio LEXIS 633, ***; 57 Ohio Op. 411

LEXSEE 164 Ohio St. 209

THE PEERLESS ELECTRIC CO.,
APPELLANT,
v.
BOWERS, TAX COMMR.,
APPELLEE.
THE TAYLOR-WINFIELD CORP.,
APPELLANT,
v.
BOWERS, TAX COMMR.,
APPELLEE.
Van HUFFEL TUBE CORP.,
APPELLANT,
v.
BOWERS, TAX COMMR.,
APPELLEE.
THE WEAN ENGINEERING CO., INC.,
APPELLANT,
v.
BOWERS, TAX COMMR.,
APPELLEE.
WEAN EQUIPMENT CORP.,
APPELLANT,
v.
BOWERS, TAX COMMR.,
APPELLEE .

Nos. 34346, 34347, 34348, 34349, 34350

164 Ohio St. 209, *; 129 N.E.2d 467, **;
1955 Ohio LEXIS 633, ***; 57 Ohio Op. 411

Supreme Court of Ohio

164 Ohio St. 209; 129 N.E.2d 467; 1955 Ohio LEXIS 633; 57 Ohio Op. 411

October 19, 1955, Decided

PRIOR HISTORY:
[***1]

APPEALS from the Board of Tax Appeals.

Appellants in the above cases filed with the Tax Commissioner their several applications for certificates of abatement of claimed overpayments of franchise taxes for the years variously from 1947 through 1951. The certificates of abatement were requested on the ground that the value of federal securities owned by appellants had been illegally included in the tax base in determining the franchise tax imposed on appellants for the years in question. Appellants base their claims on the decision in the case of *Wrenn Paper Co. v. Glander, Tax Commr., 156 Ohio St., 583, 103 N. E. (2d), 756,* contending that the same construction of the franchise-tax law should be applied here as was applied in the *Wrenn case* for the years 1945 through 1950, thus avoiding denying to taxpayers equal protection of the laws. They have abandoned their claims for the year 1951, which year was not involved in that case.

The Tax Commissioner denied the applications on authority of the decision in *Fifth Third Union Trust Co. v.*

Peck, Tax Commr., 161 Ohio St., 169, 118 N. E. (2d), 398, which overruled the *Wrenn Paper Co. case, supra.*

Upon appeals [***2] to the Board of Tax Appeals, the several appeals were consolidated for hearing and the orders of the Tax Commissioner were affirmed.

Appeals from the decision of the Board of Tax Appeals bring the causes to this court for review.

DISPOSITION:

Decision affirmed.

HEADNOTES:

Taxation -- Domestic corporations -- Franchise tax -- Tax base -- Value of federal securities owned by corporation -- Judicial decisions -- Effect of overruling -- Retrospective in operation.

COUNSEL:

Messrs. Hoppe, Day & Ford, for appellants.

Mr. C. William O'Neill, attorney general, and *Mr. W. E. Herron*, for appellee.

JUDGES:

WEYGANDT, C. J., MATTHIAS, HART, ZIMMERMAN, STEWART, BELL and TAFT, JJ., concur.

164 Ohio St. 209, *; 129 N.E.2d 467, **;
1955 Ohio LEXIS 633, ***; 57 Ohio Op. 411

OPINIONBY:
PER CURIAM

OPINION:

[*210] [**468] The Board of Tax Appeals was correct in affirming the orders of the Tax Commissioner on authority of the *Fifth Third Union Trust Co. case, supra.* The equal protection clause of the federal Constitution does not assure uniformity of judicial decisions. The general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that [***3] it never was the law. The one general exception to this rule is where contractual rights have arisen or vested rights have been acquired under the prior decision. T he assessment and payment of a tax does not grow out of a contractual relationship, and there is no showing that any rights have become vested in the appellants under such prior decision.

Decision affirmed.

298 F.3d 586, *; 2002 U.S. App. LEXIS 15470, **;
2002 FED App. 0261P (6th Cir.), ***; 53 Fed. R. Serv. 3d
(Callaghan) 228

LEXSEE 298 F.3D 586

SONDRA MCCURRY, as Mother and next Friend of Frank E. Turner, Deceased;
VICKI TURNER, Surviving Spouse of Frank E. Turner, Deceased,
Plaintiffs-Appellees,
v.
ADVENTIST HEALTH SYSTEM/SUNBELT, INC., a/k/a Takoma Adventist Hospital;
TAKOMA MEDICAL GROUP ASSOCIATED;
WILLIAM A. HAMILTON, M.D.;
RICHARD J. AASHEIM, M.D.;
LEONARD GARDBERG, M.D.;
GORDON MARSA, M.D.,
Defendants-Appellants.

No. 00-5837

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

298 F.3d 586, *; 2002 U.S. App. LEXIS 15470, **;
2002 FED App. 0261P (6th Cir.), ***; 53 Fed. R. Serv. 3d
(Callaghan) 228

298 F.3d 586; 2002 U.S. App. LEXIS 15470; 2002 FED App. 0261P (6th Cir.); 53 Fed. R. Serv. 3d (Callaghan) 228

August 7, 2001, Argued
August 2, 2002, Decided
August 2, 2002, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of Tennessee at Greeneville. No. 98-00278. Thomas G. Hull, District Judge.

DISPOSITION: Reversed in part and vacated in part.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: ARGUED: Francis L. Lloyd, Jr., LONDON & AMBURN, Knoxville, Tennessee, for Appellants.

Janice H. Snider, Morristown, Tennessee, for Appellees.

ON BRIEF: Francis L. Lloyd, Jr., LONDON & AMBURN, Knoxville, Tennessee, Jeffrey M. Ward, MILLIGAN & COLEMAN, Greenville, Tennessee, for Appellants.

Janice H. Snider, Morristown, Tennessee, Cathy H. Morton, MEARES-MORTON LAW OFFICES, Maryville, Tennessee, for Appellees.

JUDGES: Before: MOORE and COLE, Circuit Judges; ROSEN, District Judge. * ROSEN, D. J., announced the judgment of the court, and delivered an opinion in which MOORE and COLE, JJ., concurred except as to Part III.D.

> * The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINIONBY: Gerald E. Rosen

OPINION: [***2] [*588]

ROSEN, District Judge.

I. *INTRODUCTION*

This case began as a wrongful death action, but has detoured into a procedural thicket. It was commenced on August 31, 1998 by Plaintiff/Appellee Sondra McCurry, who alleged that her son, [**2] Frank E. Turner, died as a result of the negligence of the Defendant/Appellant hospital, medical [***3] group, and physicians. McCurry alleged in her complaint that the case fell within the federal courts' diversity jurisdiction, as she was a North Carolina resident and Defendants all were citizens of Tennessee. Defendants responded that McCurry lacked standing under the governing Tennessee wrongful death statute, and that the proper

plaintiff -- Mr. Turner's surviving spouse, Plaintiff/Appellee Vicki Turner, a Tennessee resident -- lacked the requisite diversity of citizenship to pursue this action in federal court. The District Court agreed on both scores, and dismissed this suit in an order dated March 12, 1999.

The case was not over, however. Instead, on March 9, 2000, just short of a year after the order of dismissal was entered, Plaintiff McCurry moved for relief from this order under Fed. R. Civ. P. 60(b)(1) and (b)(6), asking that Vicki Turner be substituted or joined as a party plaintiff in this action. In so moving, McCurry acknowledged that this relief would not cure the lack of subject matter jurisdiction recognized in the District Court's March 12, 1999 order -- and, [**3] indeed, as they appear before us, the parties are in agreement that the federal courts cannot address the merits of this case. Nevertheless, in an order dated May 17, 2000, the District Court granted the relief sought by McCurry, invoking Rule 60(b)(6) as a basis for amending its prior order of dismissal to reflect the addition of Vicki Turner as a party.

Defendants now appeal, arguing: (i) that the District Court was without power to grant post-dismissal relief that did not cure the jurisdictional defect found in the Court's prior order of dismissal; (ii) that, even if the lower court possessed such authority, it erred in granting relief under Rule 60(b)(6) without first considering, and rejecting, Plaintiff McCurry's request for relief under Rule 60(b)(1); and (iii) that the District Court's ruling was, in effect, an advisory opinion on an issue of state law that has been raised in related proceedings in the Tennessee courts. We agree that the District Court inappropriately awarded relief under Rule 60(b)(6), and therefore reverse. [***4]

II. *FACTUAL AND PROCEDURAL BACKGROUND*

A. The Underlying Wrongful Death Action

As noted at the outset, this case began [**4] as a wrongful death suit, filed in the District [*589] Court on August 31, 1998 by Plaintiff/Appellee Sondra McCurry as mother and next friend of the decedent, Frank E. Turner. In her complaint, McCurry alleged that the Defendants -- the Takoma Adventist Hospital in Madison, Tennessee, the Takoma Medical Group, and four physicians who practice in Greeneville, Tennessee -- deviated from the accepted standards of professional medical practice in treating Frank Turner's conditions, diabetic ketoacidosis and new onset diabetes. McCurry asserted that, as a result of Defendants' negligence, her son was provided inadequate medical care on several occasions in mid-October of 1997, leading to a coma, cardiac arrest, severe brain injury, acute renal failure and, ultimately, his death on October 27, 1997.

By commencing this suit in August of 1998, McCurry seemingly satisfied the applicable Tennessee statute of limitations, under which wrongful death actions must be brought within a year after they accrue. *See* Tenn. Code Ann. § 28-3-104; *see also Hathaway v. Middle Tennessee Anesthesiology, P.C., 724 S.W.2d 355, 357 (Tenn. Ct. App. 1986).* It further appeared, and McCurry affirmatively [**5] alleged in her complaint, that the case fell within the District Court's diversity jurisdiction, as McCurry is a North Carolina resident and all of the Defendants are citizens of Tennessee.

B. The District Court's Dismissal of the Action

Upon being served with an amended complaint in the fall of 1998, Defendants elected not to file an answer, but instead moved for the dismissal of the suit for failure to state a claim and for lack of subject matter jurisdiction. In support of their November 5, 1998 motion, Defendants advanced two arguments. First, they contended that McCurry was not the real party in interest because, under Tennessee law, a [***5] surviving spouse is presumptively the proper party to bring a wrongful death action. Second, they pointed out that the surviving spouse of Frank Turner, Vicki Turner, was a Tennessee resident, so that complete diversity of citizenship would have been lacking -- and, hence, the District Court would have lacked subject matter jurisdiction -- if the suit had been brought by Ms. Turner.

In response, McCurry noted that a surviving spouse may waive her right to bring a wrongful death action, and she claimed that Ms. Turner had done [**6] so. In particular, McCurry produced an affidavit in which Vicki Turner acknowledged her awareness of McCurry's suit, and declared her intention not to interfere with this suit or to "file a wrongful death action in any court in my capacity as surviving spouse of Frank E. Turner unless this suit is dismissed." (Vicki Turner Aff. at P 3, J.A. at 67.) Under these circumstances, McCurry asserted that the right of action devolved to her as Mr. Turner's next of kin, since Mr. Turner had no children.

Before ruling on Defendants' motion to dismiss, the District Court entered an order allowing Defendants to depose Sondra McCurry and Vicki Turner on the issues relating to standing and

jurisdiction. These depositions revealed: (i) that McCurry and Ms. Turner had discussed the possibility of bringing a wrongful death action; (ii) that Ms. Turner first raised the issue of filing such a suit, obtained her deceased husband's medical records, and consulted with counsel on this matter; (iii) that she then invited McCurry to travel to Tennessee to meet with counsel; (iv) that, through these discussions, the two women jointly decided to pursue a wrongful death action; (v) that they further determined [**7] that McCurry should bring this suit, as she was deemed the "more stable" of the two women, (Vicki Turner Dep. at 29, J.A. at 120); (vi) that [*590] McCurry and Ms. Turner agreed that they would share in any recovery, with Turner receiving sixty percent and McCurry getting the remaining forty percent; and (vii) that McCurry intended to involve Ms. Turner in any decisions made during the litigation, and would not accept [***6] any settlement offer without first discussing it with Ms. Turner and reaching an agreement.

Following this limited discovery, the District Court entered an order on March 12, 1999 granting Defendants' motion to dismiss, and dismissing this suit without prejudice. In this order, the Court accepted Defendants' contentions as to both standing and subject matter jurisdiction:

> A surviving spouse, who knows that he has a right of action for wrongful death, waives his right when he fails to maintain control over it by either effecting a compromise or bringing the action to trial. When a surviving spouse knowingly waives his or her right of action for wrongful death, he or she also waives his or

her right to collect any proceeds from the wrongful death action.

In this [**8] case the plaintiff contends that her son's surviving spouse has waived her right to bring this suit, and because her son had no children, she had standing to bring this suit as next of kin. However, it is undisputed that the surviving spouse in this case, Vicki[] Turner, retained the right to 60% of the proceeds from the wrongful death action, the right to be involved in settlement negotiations, and the right to file a complaint if this complaint should be dismissed. Clearly, there has been no unequivocal waiver of Mrs. Turner's right to exercise control of this wrongful death action, nor a waiver of her right to receive proceeds from this action.

Accordingly, the Court FINDS that the plaintiff has no standing to bring this lawsuit because there has been no valid waiver by her son's surviving spouse to bring this action. Because the surviving spouse is a Tennessee resident as are all the defendants, there is no diversity of citizenship, and this Court lacks jurisdiction of this medical malpractice case.

(3/12/99 Order at 3-4, J.A. at 136-37 (citations omitted).) [***7]

C. The District Court's Grant of Relief under Fed. R. Civ. P. 60(b)(6)

At some point later [**9] in 1999 or in early 2000, Sondra McCurry and Vicki Turner discharged their attorneys, J. Anthony Farmer and Paul E. Kaufman, and retained new counsel, Janice H. Snider. n1 McCurry, Turner, and their new counsel then embarked upon a number of steps designed to reinvigorate the wrongful death suit that had been dismissed in March of 1999.

n1 Ms. Snider continues to represent Plaintiffs/Appellees in the present appeal.

As part of this effort, Vicki Turner commenced a legal malpractice action against her former attorneys in Tennessee state court. The complaint in this suit alleged:

> The plaintiff consulted with and retained the defendants to represent her concerning the alleged medical malpractice of [Defendants in the present action]. During discussions between plaintiff and the defendants, J. Anthony Farmer erroneously and negligently advised the plaintiff that she had a "Ten Million Dollar" case for medical malpractice which should not be filed in the Circuit Court for Greene County, Tennessee, due to the [**10] history of low and conservative jury verdicts returned in that court. Instead, J. Anthony Farmer . . . advised the plaintiff that her suit should be filed in the U.S. District Court [*591] in Greeneville, Tennessee, to maximize the potential recovery, even though no legal basis existed

> at that time to give the federal court jurisdiction of Mrs. Turner's cause of action. In order to engineer the filing of this suit in federal court, Mr. Farmer sought to manufacture the required diversity of [citizenship] by advising the plaintiff that her mother-in-law, Mrs. Sondra McCurry, [***8] who was a resident of North Carolina, should file this suit instead of Mrs. Turner.

(J.A. at 178-79.)

McCurry and Turner also began the process of pursuing a wrongful death claim in the Tennessee courts. First, they opened an estate on behalf of Frank Turner, and were appointed as co-administrators of this estate. Next, on March 9, 2000, McCurry and Turner commenced a wrongful death suit in the Circuit Court for Greene County, Tennessee, asserting the same medical malpractice claims that had been made in the federal suit.

That same day -- March 9, 2000, just three days short of a year after the District [**11] Court had entered its order of dismissal -- McCurry and Turner moved for relief from this order under Fed. R. Civ. P. 60(b)(1) and 60(b)(6). Specifically, they sought to amend the federal court complaint to reflect McCurry's status as co-administrator and personal representative of the estate of Frank Turner, and to add Vicki Turner as a party plaintiff in her capacities as surviving spouse, co-administrator, and personal representative. In support of their motion, McCurry and Turner stated that "Vicki Turner is obviously the real party in interest in this litigation under the wrongful death statutes and case law of the State of Tennessee as both the decedent's surviving spouse and the co-administratrix of his estate," (Motion for Relief from Judgment,

Br. in Support at 3, J.A. at 148), and they faulted their prior counsel for failing to seek the substitution or joinder of Ms. Turner as a plaintiff. While they acknowledged that the requested amendments would "not preserve this Court's diversity jurisdiction," they nonetheless asserted that this relief "may be necessary to prevent impairment of their right to refile this action in another forum under the Tennessee saving statutes." [**12] (*Id.* at 9, J.A. at 154.) [***9]

By order dated May 17, 2000, the District Court held that McCurry and Turner had stated a basis for relief under Rule 60(b)(6). In so ruling, the Court noted that the purpose of the requested relief was to "preserve Mrs. Turner's cause of action for the death of her husband" against the possible running of the Tennessee statute of limitations for wrongful death actions. (5/17/00 Order at 2, J.A. at 22.) The Court also recognized that relief should be awarded under Rule 60(b)(6) "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of [Rule 60(b)]." (*Id.* at 2, J.A. at 22 (quoting *Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989)).)* Without explicitly considering these first five subsections, however, the Court found that exceptional circumstances existed within the meaning of Rule 60(b)(6). The Court reasoned that Defendants had maintained from the outset that Vicki Turner, and not Sondra McCurry, was the proper party plaintiff, so that "substantial justice would be served" by amending the March 12, 1999 order to add Ms. Turner as a plaintiff. [**13] (5/17/00 Order at 3, J.A. at 23.)

Defendants now appeal this award of relief under Rule 60(b)(6). We agree that this relief was unwarranted, and accordingly vacate the District Court's May 17, 2000 order. [*592]

III. *ANALYSIS*

A. The Standards Governing This Appeal

The District Court entered its challenged May 17, 2000 order under the authority of Rule 60(b), which provides in relevant part:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence [***10] could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer [**14] equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one

> year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b). The party seeking to invoke the Rule bears the burden of establishing that its prerequisites are satisfied. *See Jinks v. AlliedSignal, Inc., 250 F.3d 381, 385 (6th Cir. 2001).*

By providing that a District Court "may" relieve a party from a final judgment or order, Rule 60(b) allows for some discretion in determining whether to grant such relief. Consequently, we review such a decision for an abuse of discretion. *See Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefit Fund, 249 F.3d 519, 524* (6th Cir.), *cert. denied, 151 L. Ed. 2d 562, 122 S. Ct. 643 (2001); Amernational Industries, Inc. v. Action-Tungsram, Inc., 925 F.2d 970, 975* (6th Cir.), *cert. denied, 501 U.S. 1233 (1991).* A finding of an abuse of discretion must rest upon "a definite and firm conviction [**15] that the trial court committed a clear error of judgment." *Blue Diamond Coal, 249 F.3d at 524* (internal quotations and citation omitted). This may occur where, for example, the District Court "applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." *Schenck v. City of Hudson, 114 F.3d 590, 593 (6th Cir. 1997).*

Moreover, in the specific context of relief from a final judgment or order, we recently explained: [***11]

> Relief under Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination

> of litigation. This is especially true in an application of subsection (6) of Rule 60(b), which applies only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule. This is because almost every conceivable ground for relief is covered under the other subsections of Rule 60(b). Consequently, courts must apply Rule 60(b)(6) relief only in unusual and extreme situations where principles of equity *mandate* relief.

Blue Diamond Coal, 249 F.3d at 524 (internal quotations [**16] and citations omitted).

B. The District Court Erred in Awarding Relief under Rule 60(b)(6) Without First Considering the Applicability of Subsection (b)(1) of the Rule.

In their motion seeking relief from the District Court's March 12, 1999 [*593] order of dismissal, Sondra McCurry and Vicki Turner appealed to subsections (1) and (6) of Rule 60(b). In granting relief under the latter subsection, the District Court acknowledged the principle that this clause applies only under those "exceptional or extraordinary circumstances" that are not addressed in the preceding five subsections of the Rule. (5/17/00 Order at 2, J.A. at 22 (quoting *Hopper, supra*, 867 F.2d at 294).) The remainder of the May 17, 2000 order, however, does not address subsection (1) of the Rule, but instead determines only that relief is warranted under subsection (6). On appeal, Defendants assert that this was error. We agree

Rule 60(b)(1) authorizes relief from a judgment or order on the basis of "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). In their Rule 60(b) motion in the court below, McCurry and Turner cited mistake, inadvertence and excusable neglect as grounds [**17] for amending the March 12, 1999 order of dismissal. Specifically, they [***12] contended that they held a "sincere, mistaken belief" that McCurry could properly pursue a wrongful death claim arising from her son's death, and that Ms. Turner's failure to seek joinder or substitution as the "real party in interest" prior to the entry of an order of dismissal was the product of "understandable inadvertence or excusable neglect." (Motion for Relief from Judgment, Br. in Support at 3, J.A. at 148.) All of this, in their view, was attributable to their lack of legal knowledge or background, and their reliance on the "erroneous advice of their former attorney." (Reply Br. in Support of Motion for Relief from Judgment at 3, J.A. at 187.) Likewise, in their brief on appeal, McCurry and Turner assert that "Mrs. Turner's interest in this litigation was not adequately protected by her former attorney." (Appellees' Br. at 23.)

These claims of attorney error and legal malpractice foreclose an award of relief under Rule 60(b)(1). In particular, we recognized in *FHC Equities, L.L.C. v. MBL Life Assurance Corp., 188 F.3d 678, 683-87 (6th Cir. 1999),* that neither strategic miscalculation [**18] nor counsel's misinterpretation of the law warrants relief from a judgment. There, we considered whether the plaintiff could invoke Rule 60(b)(1) to overcome its untimely filing of a notice of appeal. The plaintiff attributed this failure to its counsel's mistaken interpretation of the relevant Federal Rules of Civil Procedure, and argued that this constituted "inadvertence,

mistake, or surprise" within the meaning of Rule 60(b)(1). *FHC Equities, 188 F.3d at 683.*

We held otherwise. Initially, we noted that "Plaintiff does not point us to a single case . . . which holds that attorney misinterpretation of the law can constitute 'mistake' under Rule 60(b)(1)." *188 F.3d at 684.* In contrast, we identified several cases from other circuits "in which the alleged 'mistake' was the attorney's misinterpretation of the law or a strategy decision," and we observed that the courts in those cases had declined to grant relief under Rule 60(b)(1). *188 F.3d at 685* (collecting cases). We cited, for example, the [***13] decision in *Nemaizer v. Baker, 793 F.2d 58 (2d Cir. 1986),* where the Second Circuit reviewed a District Court's decision [**19] to grant relief under Rule 60(b) in order to avoid the apparently unintended *res judicata* effect of a voluntary dismissal with prejudice. The Second Circuit set aside this award, stating that "an attorney's failure to evaluate carefully the legal consequences of a chosen course of action provides no basis for relief from a judgment." *Nemaizer, 793 F.2d at 62.* Based on these authorities, we concluded that the attorney's misinterpretation of the rules in the [*594] case before us did not "constitute[] 'mistake' justifying the setting aside of a judgment under Rule 60(b) to permit a second bite at the appeal apple." *FHC Equities, 188 F.3d at 687.*

We find these same principles controlling here. To be sure, the facts and circumstances of this case are not on all fours with those presented in *FHC Equities*. Some question remains in this case as to whether McCurry's and Turner's former counsel made a purely strategic, wholly deliberate decision to name only McCurry as a party, aware of the risk that Defendants might challenge her

standing to pursue a wrongful death action; whether counsel instead overlooked the governing Tennessee statutes identifying [**20] the proper parties to bring a wrongful death action; or whether counsel held a good faith belief that Ms. Turner had effectively waived her right to bring such an action, thereby permitting Ms. McCurry to do so as Frank Turner's next of kin. Regarding each of these possibilities, there is the further question whether counsel fully informed McCurry and Turner as to the controlling law and the potential consequences of any strategies they might have employed. Ms. Turner has stated that she and McCurry were not so advised:

> When Mr. Farmer made the decision to file suit in federal court, he did not explain the procedural aspects of this decision in any meaningful way to either myself or Mrs. McCurry. We were merely told that this was the best way to proceed because the attorney did not want to file suit in state court. We were ignorant of the concept [***14] of standing to sue in the context of a wrongful death action and did not know that a parent had no right to sue in this case. We had no knowledge that Mrs. McCurry was not a proper plaintiff and our attorney never told us there was any risk involved in my mother-in-law being the plaintiff.

(Vicki Turner Aff. at P 6, [**21] J.A. at 194-95.)

Yet, these outstanding factual questions do not take this case outside the rule stated in *FHC Equities* and our other Rule 60(b) decisions. If McCurry's and Turner's former attorney was mistaken

as to the governing law and his clients relied upon this mistaken advice, *FHC Equities* precludes the use of Rule 60(b)(1) to relieve McCurry and Turner of the consequences of this error. If, on the other hand, their former counsel was fully apprised of the Tennessee wrongful death statutes and deliberately chose a strategy that he deemed advantageous to his clients, we have stated that a Rule 60(b) motion may not be used "as a technique to avoid the consequences of decisions deliberately made yet later revealed to be unwise." *Hopper, supra*, 867 F.2d at 294; *see also FHC Equities, 188 F.3d at 687* ("Where counsel makes a deliberate choice to rely on one legal theory, the party cannot thereafter attempt to be relieved of the consequences of that conscious decision should the theory prove to be unsuccessful." (internal quotations and citations omitted)).

Nor does it matter that any mistake or strategic choice might have been made by McCurry's and [**22] Turner's former counsel, rather than by the two women themselves, or that they might have been less than fully informed, knowledgeable and active participants in the decisionmaking process. In addressing a claim of excusable neglect in an attorney's failure to timely file a proof of claim in a bankruptcy proceeding, the Supreme Court stated the general rule that "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 396, 113 S. Ct. 1489, 1499, 123 L. Ed. 2d 74* [***15] *(1993).* [*595] The Court explained that a client, having chosen a particular attorney to represent him in a proceeding, cannot "avoid the consequences of the acts or omissions of this freely selected agent," and that "any other notion would be wholly inconsistent with our system of

representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Pioneer Inv. Servs., 507 U.S. at 397, 113 S. Ct. at 1499* (internal quotations and citations omitted).

Thus, in assessing [**23] a claim of excusable neglect, "the proper focus is upon whether the neglect of [the parties] *and their counsel* was excusable." *507 U.S. at 397, 113 S. Ct. at 1499* (emphasis in original). As is fairly evident from our ruling in *FHC Equities*, an attorney's inaction or strategic error based upon a misreading of the applicable law cannot be deemed "excusable" neglect, even though it might well be excusable for the client to rely on the advice of counsel. Other courts have agreed, recognizing that "the case law consistently teaches that out-and-out lawyer blunders -- the type of action or inaction that leads to successful malpractice suits by the injured client -- do not qualify as 'mistake' or 'excusable neglect' within the meaning of [Rule 60(b)(1)]." *Helm v. Resolution Trust Corp., 161 F.R.D. 347, 348 (N.D. Ill. 1995), aff'd, 84 F.3d 874 (7th Cir. 1996); see also United States v. Prairie Pharmacy, Inc., 921 F.2d 211, 214 (9th Cir. 1990)* (holding that an attorney's "failure to verify the requirements of the law demonstrates attorney malpractice, not excusable neglect under the law of this circuit"); *Pryor v. U.S. Postal Serv., 769 F.2d 281, 288-89 (5th Cir. 1985)* [**24] ("Were this Court to make an exception to finality of judgment each time a hardship was visited upon the unfortunate client of a negligent or inadvertent attorney, even though the result be disproportionate to the deficiency, courts would be unable to ever adequately redraw

that line again, and meaningful finality of judgment would largely disappear."). [***16]

Accordingly, while McCurry and Turner presumably depended upon their counsel to resolve such legal matters as whether the federal court was a proper forum, whether McCurry had standing to bring a wrongful death action, and whether to seek the joinder or substitution of Turner as a plaintiff, this does not mean that any miscalculation as to these issues, and any adverse ruling that resulted, is correctable by resort to Rule 60(b)(1). Rather, the uniform decisions of this and other circuits establish that this provision does not permit litigants and their counsel to evade the consequences of their legal positions and litigation strategies, even though these might prove unsuccessful, ill-advised, or even flatly erroneous. It follows, then, that McCurry and Turner were not entitled to relief under Rule 60(b)(1) from the District [**25] Court's order of dismissal.

It is only a short step from this conclusion to the final result urged by Defendants -- namely, that the District Court abused its discretion by awarding relief under Rule 60(b)(6). As noted earlier, and as the District Court recognized, subsection (b)(6) of the Rule applies "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Hopper, 867 F.2d at 294.* Such situations are rare, "because almost every conceivable ground for relief is covered under the other subsections of Rule 60(b)." *Blue Diamond Coal, supra*, 249 F.3d at 524 (internal quotations and citations omitted).

So it is here, where the grounds advanced by McCurry and Turner as justifying [*596] relief from the District Court's order

of dismissal fit quite comfortably within the range of circumstances addressed in Rule 60(b)(1). To the extent that McCurry and Turner cite strategic misjudgments and flawed legal analysis by their counsel as bases for relief, these are most aptly termed "mistakes" -- but not of a sort that would warrant relief under subsection (b)(1) of the Rule. Similarly, while McCurry and Turner [**26] fault their former counsel for failing to name Ms. Turner as a plaintiff, we have explained [***17] that this might well be characterized as "neglect," yet is not "excusable" within the meaning of Rule 60(b)(1).

Given the precise fit between the circumstances presented here and those addressed in Rule 60(b)(1), and given our conclusion that subsection (b)(1) affords no basis for relief from the District Court's order of dismissal in this case, it clearly would be inappropriate to invoke subsection (b)(6) to grant relief that is foreclosed under subsection (b)(1). We have observed that these two clauses are mutually exclusive, with relief available under subsection (b)(6) only in the event that none of the grounds set forth in clauses (b)(1) through (b)(5) are applicable. *See Olle v. Henry & Wright Corp., 910 F.2d 357, 366 (6th Cir. 1990).* Were it otherwise, our decisions involving the first five clauses of Rule 60(b) -- *FHC Equities*, for example -- would lose much of their force, as a party who failed to meet the prerequisites for relief under one of these provisions could simply appeal to the "catchall" of subsection (b)(6).

Certainly, no such rule of recourse [**27] can be gleaned from our precedents. To the contrary, we have repeatedly emphasized that Rule 60(b)(6) applies only in exceptional and extraordinary circumstances. The grounds for relief identified in this case,

involving straightforward claims of attorney error and strategic miscalculation, do not satisfy this rigorous standard. Consequently, we find that the District Court abused its discretion in granting relief from its order of dismissal under Rule 60(b)(6). n2

n2 Given this determination, we need not consider Defendants' alternative argument that the Rule 60(b) motion, although filed just short of a year after the entry of the order of dismissal, was not "made within a reasonable time" as required under the Rule.

[***18]

C. The Award of Rule 60(b)(6) Relief in This Case Did Not Serve the Interests of Substantial Justice.

In addition to arguing that the District Court failed to consider the applicability of Rule 60(b)(1) before granting relief under subsection (b)(6) of that Rule, Defendants [**28] have identified various other reasons why, in their view, the District Court's award of relief was inappropriate. We address one of these contentions here, as it lends further support to our conclusion that an award of postjudgment relief in this case does not serve the interests of "substantial justice" as required under our precedents. *See Cincinnati Ins. Co. v. Byers, 151 F.3d 574, 578 (6th Cir. 1998).*

In its March 12, 1999 order of dismissal, the District Court held that Sondra McCurry lacked standing to bring this action, and that the federal courts lacked subject matter jurisdiction over a

wrongful death suit brought by the ostensibly proper plaintiff, Vicki Turner, where Ms. Turner and Defendants all were citizens of Tennessee. Neither of these conclusions is challenged on appeal. In particular, all are agreed that the federal courts cannot exercise subject matter jurisdiction over a wrongful death action arising from the death of Frank Turner, because the requisite complete diversity of citizenship would [*597] be lacking. n3 It is further acknowledged by all parties that no grant of relief under Rule 60(b) could overcome this jurisdictional defect. Indeed, at the [**29] District Court hearing on the Rule 60(b) motion, counsel for McCurry and Turner conceded that, regardless of the outcome, "there still will not [***9] be diversity . . . jurisdiction," and that the District Court was "correct in dismissing" the case. (5/15/00 Hearing Tr. at 4, 13, Suppl. J.A. at 4, 13.)

n3 This presumably remains true even though Sondra McCurry arguably has cured her lack of standing by securing an appointment as co-administrator of Frank Turner's estate. Her fellow administrator is Vicki Turner, a Tennessee resident. More importantly, the federal statute that confers diversity jurisdiction provides that "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent." *28 U.S.C. § 1332*(c)(2). Thus, in her capacity as legal representative of the estate of her late son, a Tennessee resident, McCurry would also be deemed a Tennessee resident.

Under these circumstances, the District Court's subsequent grant of [**30] relief under Rule 60(b)(6) raises a jurisdictional concern. The power of the federal courts extends only to "cases" and "controversies," U.S. Const. art. III, § 2, cl. 1, and this constitutional limitation has been interpreted as precluding the federal courts from issuing advisory opinions. *See North Carolina v. Rice, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413 (1971)* ("Federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them."); *General Electric Co. v. Local 761, Int'l Union of Elec., Radio & Machine Workers, 395 F.2d 891, 895 (6th Cir. 1968)* ("The duty of this Court is to decide actual controversies by a judgment which can be carried into effect, and not to . . . declare principles or rules of law which cannot affect the matter in issue in the case before it." (internal quotations and citation omitted)). The challenged postjudgment ruling in this case implicates this principle where, as noted, all are agreed: (i) that the federal courts lack subject matter jurisdiction over this wrongful death action; (ii) that, for this and other reasons, the District Court properly dismissed [**31] this suit; and (iii) that nothing in the Rule 60(b) relief sought by McCurry and Turner would overcome this lack of jurisdiction. In light of all this, it is evident that the District Court's ruling on the Rule 60(b) motion could have no conceivable bearing upon any claim or issue in the present case.

McCurry and Turner admit as much. Before the District Court, their counsel candidly stated that the "real reason" for their Rule 60(b) motion was to anticipate a statute of limitations defense that Defendants were likely to assert in the state court wrongful death action brought by McCurry and Turner. (5/15/00 Hearing Tr. at 13,

Suppl. J.A. at 13.) Tennessee has enacted a savings statute, which "provides that if an action is filed within the statute of limitations and a [***20] judgment of dismissal entered, on any ground not concluding the right of action, the action may be refiled [within] one year after the dismissal." *Cronin v. Howe, 906 S.W.2d 910, 911 (Tenn. 1995)* (citing Tenn. Code Ann. § 28-1-105(a)); *see also Lee v. Crenshaw, 622 F.2d 202, 203-04 (6th Cir. 1980)* (addressing the Tennessee savings statute); Tenn. Code Ann. § 28-1-115 (also [**32] allowing a one-year period to refile in the event that a federal court suit is dismissed for lack of jurisdiction). Although McCurry and Turner filed their state court wrongful death suit within a year after the District Court entered its March 12, 1999 order of dismissal, they apparently are concerned that a lack of complete identity between the plaintiffs in this suit -- initially, only McCurry -- and the plaintiffs in the state [*598] court action -- both McCurry and Turner -- might jeopardize their appeal to the one-year savings statute. Through their Rule 60(b) motion, McCurry and Turner sought to establish this complete identity by joining Ms. Turner as a plaintiff in the federal action, and the District Court granted this relief in the May 17, 2000 order now on appeal.

Given this ruling's lack of impact upon any matter at issue in *this* case -- and, indeed, it does not appear that there *were* any outstanding issues in this case at the time of the ruling -- it is extremely doubtful whether the circumstances permitted an exercise of the District Court's limited jurisdiction over actual cases and controversies. To be sure, the authority conferred upon a District Court under Rule [**33] 60(b) is broad enough to permit relief from any sort of final order or judgment, even one which

rests upon a jurisdictional ground; we do not mean to suggest that jurisdictional rulings are especially immune from reconsideration. It is far less certain, however, that the Rule would authorize relief that does nothing to cure a defect in subject matter jurisdiction that was identified in the preceding order or judgment.

In any event, we are quite sure that the circumstances of this case did not justify an award under Rule 60(b)(6) which, in the end, offers no discernable relief from the underlying [***21] order of dismissal, and which cannot possibly alter the pertinent procedural background of this case. Regardless of how the District Court ruled on McCurry's and Turner's Rule 60(b) motion, there is no getting around the brute historical facts that McCurry alone instituted the federal suit, and that Turner was not named as a party. Nor, on the other hand, can any award of postjudgment relief alter the statements in the record as to: (i) Defendants' position at the outset of these proceedings that Vicki Turner, and not Sondra McCurry, was the real party in interest in the wrongful [**34] death action arising from Frank Turner's death; and (ii) the District Court's acceptance of this position as one of the bases for its order of dismissal. Finally, to the extent that factual questions remain that might conceivably have a bearing upon the timeliness of the state court suit -- *e.g.*, questions regarding the motives behind, and the persons responsible for, the decision to name Sondra McCurry as the sole plaintiff in the federal suit -- the District Court did not purport to make findings on these issues, and its postjudgment ruling did nothing to resolve them.

As to all of these historical facts and outstanding questions, it is within the exclusive province of the Tennessee courts to determine their legal significance to the survival and timeliness of

McCurry's and Turner's state court wrongful death action. If it could be said that some inaccuracy in the federal court record or proceedings threatened to unduly prejudice the state court litigation, it might be appropriate to correct such a defect through Rule 60 or some other means. Yet, no such inaccuracy or ambiguity has been identified. We find, therefore, that the award of Rule 60(b)(6) relief in this case did not [**35] serve the interests of substantial justice, and that the District Court abused its discretion in granting this relief. n4

n4 Defendants have identified another possible jurisdictional or procedural defect in the District Court's postjudgment ruling. Ordinarily, if a federal court determines that it lacks subject matter jurisdiction, as the court below did in its March 12, 1999 order, it must dismiss the case and proceed no further. *See* Fed. R. Civ. P. 12(h)(3). The District Court, however, entertained a subsequent request for further relief, even though no one questioned its prior ruling as to lack of jurisdiction. It then ordered the joinder of an admittedly non-diverse party, Vicki Turner, whose presence in the case surely would have deprived the lower court of any subject matter jurisdiction it previously possessed.

This procedure seemingly was contrary to the terms of Federal Rule of Civil Procedure 19, which governs the compulsory joinder of parties. Subsection (a) of this Rule instructs that necessary parties "shall be joined" in an action, but only if, among other things, this "joinder will not deprive

the court of jurisdiction." Fed. R. Civ. P. 19(a). If such a party cannot be joined in the action, whether for jurisdictional or other reasons, the court must "determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed." Fed. R. Civ. P. 19(b). The plain language of this Rule, then, appears to preclude the procedure advocated by McCurry and Turner and employed by the District Court -- namely, joinder of a non-diverse party, which in turn mandates dismissal for lack of jurisdiction. Rather, the Rule seemingly contemplates that such a party *cannot* be joined, as this would defeat the court's subject matter jurisdiction, and it instead directs the court to inquire whether the case should continue absent this joinder or should be dismissed as lacking an indispensable party.

Our precedents, however, are not entirely clear as to whether an indispensable yet non-diverse party can or cannot be joined prior to the dismissal of a suit. In *Jenkins v. Reneau, 697 F.2d 160, 163 (6th Cir. 1983),* for example, we affirmed the dismissal of a suit for lack of an indispensable party, but stated that "it was not necessary" for this indispensable, non-diverse party to be joined prior to dismissal. By contrast, we stated in *Schuckman v. Rubenstein, 164 F.2d 952, 956, 39 Ohio Op. 406, 55 Ohio Law Abs. 65 (6th Cir. 1947), cert. denied, 333 U.S. 875, 92 L. Ed. 1151, 68 S. Ct. 905 (1948),* that if the joinder of an indispensable party would "destroy[] diversity of citizenship, he must nevertheless be joined as a party with the resulting loss of jurisdiction by the trial court." In light of our

disposition of this appeal on other grounds, we need not attempt to resolve this difficult, somewhat metaphysical issue of joinder under Rule 19.

[**36] [***22] [*599]

D. The District Court Erred in Awarding Postjudgment Relief Which Was Sought for the Express Purpose of Influencing the State Court Litigation.

Apart from the reasons identified in the opinion of the Court for reversing the District Court's grant of Rule 60(b) relief, I write separately to express an additional concern with [***23] this award. The foregoing discussion establishes, in essence, that postjudgment relief was inappropriate in this case because of what it did *not* do -- *i.e.,* affect any matter at issue in the federal suit. I would hold that this award also was inappropriate for what it *did* do (or at least was intended to do) -- *i.e.,* influence the outcome of a matter before the state court.

One of the most striking features of this case, in my view, is that a litigant would invoke the Federal Rules of Civil Procedure for the deliberate purpose of circumventing a substantive state policy -- here, the Tennessee statute of limitations governing wrongful death actions. While McCurry and Turner (and their counsel) are perhaps to be admired for their candor, the stated mission of their postjudgment motion was flatly at odds with the limited [**37] jurisdiction of the federal courts. In particular, I do not believe that Rule 60(b) may be invoked to throw the weight of the District Court behind one side or another on an issue pending

before a state court. To conclude otherwise in this case would bespeak a mistrust of the Tennessee courts' capacity to properly interpret the federal court record and the District Court's order of dismissal.

Considerations of comity and federalism strongly counsel against any such federal court interference in matters before the state court. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431, 102 S. Ct. 2515, 2521, 73 L. Ed. 2d 116 (1982)* (recognizing a "strong federal policy against federal-court interference with pending state judicial proceedings," [*600] grounded in notions of comity and federalism). This reluctance should be even greater where, as here, a litigant arguably has engaged in a "race to the courthouse," seeking a favorable ruling from the federal court before the state court can reach the issue. Indeed, under the circumstances presented here, the state court is in a far superior position to interpret and apply the controlling Tennessee law, to [**38] resolve any outstanding factual issues, and to weigh any equitable considerations that might be involved [***24] in determining whether McCurry and Turner timely commenced their state court wrongful death suit. *Cf. Chapman v. King, 572 S.W.2d 925 (Tenn. 1978)* (citing a variety of factual and equitable considerations in determining whether a wrongful death suit brought by the wrong party was barred by the statute of limitations); *Gogan v. Jones, 197 Tenn. 436, 273 S.W.2d 700 (Tenn. 1954)* (same). Accordingly, I would hold that the potential for interference with state court proceedings provides an additional basis for reversing the District Court's grant of Rule 60(b) relief.

IV. *CONCLUSION*

For the reasons set forth above in all but Part III.D of this opinion, we REVERSE the District Court's decision to grant postjudgment relief under Rule 60(b)(6), and VACATE the May 17, 2000 order through which the lower court awarded this relief.

LEXSEE 62 F.3D 767

GOVERNMENT FINANCIAL SERVICES ONE LIMITED PARTNERSHIP,
Plaintiff-Appellee,
v.
PEYTON PLACE, INC. and I-10 Inc. fka Management Equities Corporation,
Defendants, Peyton Place, Inc.,
Defendant-Appellant.

No. 94-30297

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

62 F.3d 767; 1995 U.S. App. LEXIS 25273; 32 Fed. R. Serv. 3d (Callaghan) 376

September 7, 1995, Decided

SUBSEQUENT HISTORY: [**1] As Corrected.

62 F.3d 767, *; 1995 U.S. App. LEXIS 25273, **;
32 Fed. R. Serv. 3d (Callaghan) 376

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Louisiana. D.C. DOCKET NUMBER CA 92-3410 E. JUDGE Marcel Livaudais, Jr.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: ATTORNEYS FOR APPELLANT: William E. Brown, Covington, LA.

ATTORNEYS FOR APPELLEE: NEWMAN, MATHIS, ET AL., Robert A. Mathis, Metairie, LA.

JUDGES: Before POLITZ, Chief Judge, EMILIO M. GARZA and STEWART, Circuit Judges.

OPINIONBY: EMILIO M. GARZA

OPINION:

[*768] EMILIO M. GARZA, Circuit Judge:

Peyton Place, Inc., appeals from the district court's denial of both its motion for relief from judgment, *see* Fed.R.Civ.P. 60(b), and its motion for a new trial, *see* Fed.R.Civ.P. 59(a). We affirm.

I

At the time of the events underlying this suit, Robert Guastella was President of Management Equities Corp.

("MEC"), now known as I-10, Inc., and a shareholder and employee of Peyton Place, Inc. ("Peyton Place"). MEC executed a promissory note in the amount of $ 600,000 in favor of Southern Savings Bank ("Southern Savings"). The $ 600,000 note was secured by a mortgage encumbering a hotel in New Orleans, Louisiana. [*769] Ownership of the hotel was subsequently transferred to Peyton Place, which assumed the indebtedness.

Several years after the hotel mortgage was executed, Robert Guastella obtained a loan from Southern Savings in the amount of $ 114,000, which was secured by a mortgage on his residence, 3721 Rue Chardonnay, in Metairie, Louisiana. Soon thereafter, Peyton [**2] Place executed a mortgage encumbering two units of Metairie condominiums known as Peyton Place Condominiums, both of which are owned by Peyton Place.

The Resolution Trust Corporation ("RTC"), during the time it was the receiver for Southern Savings, n1 filed suit in state court against Peyton Place and I-10, seeking to foreclose on the condominium mortgage. The RTC contended that the condominium mortgage was executed as additional security for the $ 600,000 note, which is past due. Peyton Place contends that the condominium mortgage was executed as additional security for the $ 114,000 residential loan.

n1 Government Financial Services One Limited Partnership ("GFS") is currently the receiver for Southern Savings and has been substituted as Plaintiff-Appellee for the purposes of this appeal.

The court presiding over the foreclosure proceedings scheduled a sheriff's sale of the condominiums. Before the sale could take place, however, Peyton Place filed a "Petition for Issuance of an Injunction to Arrest Seizure [**3] and Sale under Executory Process," and the RTC removed the matter to federal court.

At the federal district court's hearing on Peyton Place's request for injunctive relief, Peyton Place submitted to the court a photocopy of the condominium mortgage that is on file in the Jefferson Parish Mortgage Office. n2 On its face, the mortgage stipulates that it secures the $ 600,000 promissory note assumed by Peyton Place. Peyton Place contended at the hearing that the mortgage had been altered before it was filed, and called several witnesses to testify in support of its assertion.

> n2 Peyton Place claims that it has not been able to find a copy of the condominium mortgage in its own files. Robert Guastella testified at the hearing that he was present at the signing, but that he did not receive a copy at that time. He further testified that he does not know if Peyton Place ever received a copy of the condominium mortgage.

The district court denied Peyton Place's request for injunctive relief, concluding that Peyton Place [**4] "had not sustained their burden on the issue of fraud or lack of

authenticity so as to justify setting aside a mortgage which on its face[ ] appeared to be duly prepared, executed, and recorded." Peyton Place filed a "Motion to Supplement, for New Trial and/or for Relief from Judgment," in which it moved for a new trial under Rule 59 of the Federal Rules of Civil Procedure or, in the alternative, relief from the court's judgment under Rule 60(b) of the Federal Rules of Procedure. Peyton Place filed three memoranda in support of its motion.

With the motion, Peyton Place filed a "Memorandum in Support of Motion to Supplement, for New Trial and/or for Relief from Judgment" (the "First Memorandum"), in which it stated that it had obtained three appraisal sketches of 3721 Rue Chardonnay. Peyton Place argued that the court should reconsider its judgment in light of the sketches.

Peyton Place later filed an "Ex Parte Motion to File Supplemental Memorandum and Memorandum in Support" (the "Second Memorandum"), in which it informed the court that it had obtained a copy of a forbearance agreement between Peyton Place and Southern Savings, n3 and that it had discovered that the first page [**5] of the condominium mortgage filed in the Jefferson Parish mortgage records i s a photocopy. n4 Peyton Place argued that its discovery of the agreement [*770] and missing mortgage page provided further reason for the court to reconsider its judgment.

n3 In the forbearance agreement, Southern Savings agrees to forbear from foreclosing on the hotel mortgage securing the $ 600,000 promissory in exchange for the assignment of Peyton Place's proceeds from a contract that Peyton Place had entered into with a third party. Peyton Place contends that the forbearance agreement, which was executed slightly over a month before the condominium mortgage, is evidence that the condominium mortgage was not executed as security for the $ 600,000 note.

n4 The front and back of the "first page" of the condominium mortgage on file in the mortgage office are the first two pages of the original mortgage, and both sides are photocopies. Both sides of the "second page," the third and fourth pages of the original, are originals.

Peyton [**6] Place then filed an "Ex Parte Motion to File Second Supplemental Memorandum in Support of Motion for New Trial and/or Relief from Judgment and Memorandum in Support" (the "Third Memorandum"), in which it stated that it had received a letter from Oster & Wegener, Southern Savings' attorneys, and that Oster & Wegener claimed in the letter that all of the documents in their possession concerning the relevant loans and mortgage had been seized by the RTC before the trial. In its Third Memorandum, Peyton Place argued that the RTC's

failure to produce these documents at trial provided additional grounds for the court to reconsider its judgment.

The district court denied Peyton Place's motion, concluding that it "amounted to little more than an attempt to reargue its case through a new attorney." n5 Peyton Place appeals the district court's denial, claiming that the court erred in holding that it was not entitled to either a new trial under Rule 59 or relief from the court's judgment under Rule 60(b). n6

n5 Peyton Place obtained new counsel after the denial of its request for injunctive relief.

n6 Our caselaw provides some support for the contention that motions brought under Rules 59 and 60(b) are mutually exclusive. For example, we stated in *Goodman v. Lee, 988 F.2d 619 (5th Cir.1993),* that:

> Recognizing that Federal Rules of Civil Procedure 59 and 60 may be used to correct similar errors, this Circuit has established a bright line rule for distinguishing Rule 59 motions from Rule 60 motions. If a motion is served within ten (10) days following the entry of judgment and draws into the question the correctness of the judgment, it will be treated as a Rule 59 motion for

> purposes of determining the timing of notices of appeal from the judgment.
>
> *Id. at 623 n. 2; accord Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 984 (5th Cir.1992).* Because the district court considered both of Peyton Place's asserted grounds for relief, and because neither the RTC nor GFS has argued that we should not, we review both Peyton Place's Rule 59 and Rule 60(b) claims.

[**7]

II

Under Federal Rule of Civil Procedure 60(b), a court may relieve a party from a final judgment on the basis of newly discovered evidence, evidence of misconduct on the part of an adverse party, or "any other reason justifying relief from the operation of the judgment." n7 We will reverse a district court's denial of a Rule 60(b) motion only if the court abused its discretion. *First Nationwide Bank v. Summer House Joint Venture, 902 F.2d 1197, 1200-01 (5th Cir.1990).* We apply this deferential standard "to ensure that 60(b) motions do not undermine the requirement of a timely appeal." *Id.* " "To overturn the district court's denial of [a] Rule 60(b) motion, it is not enough that a grant of the motion might have been permissible or warranted; rather, the decision to deny the motion must have been sufficiently unwarranted as to amount to an abuse of discretion.' "

Lancaster v. Presley, 35 F.3d 229, 231 (5th Cir.1994) (quoting *Fackelman v. Bell, 564 F.2d 734, 736 (5th Cir.1977)), cert. denied, U.S. , 115 S. Ct. 1380, 131 L. Ed. 2d 233 (1995).*

n7 Rule 60(b) provides that a court may:

> relieve a party ... from a final judgment ... for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud ..., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.
>
> Fed.R.Civ.P. 60(b).

[**8]

A

Peyton Place contends that the district court's denial of its Rule 60(b) motion was erroneous in light of the newly discovered evidence. Under Rule 60(b)(2), n8 a court may relieve a party from a final judgment on [*771] the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." n9 "To succeed on a motion brought under 60(b)(2) based on newly discovered evidence, the movant must demonstrate (1) that it exercised due diligence in obtaining the information and (2) "the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment.' " *New Hampshire Ins. Co. v. Martech USA, Inc., 993 F.2d 1195, 1200-01 (5th Cir.1993)* (footnote omitted) (quoting *Brown v. Petrolite Corp., 965 F.2d 38, 50 (5th Cir.1992))*. n10 "The newly discovered evidence must be in existence at the time of trial and not discovered until after trial." *Longden v. Sunderman, 979 F.2d 1095, 1102-03 (5th Cir.1992).*

n8 Although Peyton Place specifically refers only to subsections (3) and (6) as bases for its Rule 60(b) motion, we construe its argument for Rule 60(b) relief on the basis of newly discovered evidence to be a claim under subsection (2). *See Edward H. Bohlin Co. v. Banning Co., 6 F.3d 350, 356 (5th*

Cir.1993) (stating that Rule 60(b) should be liberally construed in order to do substantial justice). [**9]

n9 Rule 59(b) provides that, under Rule 59, "[a] motion for a new trial shall be served not later than 10 days after the entry of the judgment." Although Peyton Place filed a Rule 59 motion for a new trial along with its motion for relief from judgment under Rule 60(b), Peyton Place does not base its Rule 60(b)(2) claim on evidence that it obtained within ten days after the entry of judgment. Ten days after entry of judgment, Peyton Place had only filed its First Memorandum in support of its Rule 59 motion. The First Memorandum mentions only the discovery of the appraisal sketches, which have not been mentioned since. The evidence on which Peyton Place bases its Rule 60(b)(2) motion was presented in the Second Memorandum and Third Memorandum, which were filed more than ten days after the entry of judgment.

n10 *See Chilson v. Metropolitan Transit Auth., 796 F.2d 69, 72 (5th Cir.1986)* (" "The movant must show that the evidence was discovered following the trial, that he used due diligence to discover the evidence at the time of the trial, that the evidence is not merely cumulative nor impeaching, that it is material, and that a new trial in which the evidence was introduced would probably produce a different

result.' " (quoting *Johnson Waste Materials v. Marshall, 611 F.2d 593, 597 (5th Cir.1980)).*

[**10]

In its Third Memorandum, Peyton Place provided a "summary of the new evidence obtained by Peyton Place, Inc. since the trial," listing: (1) "The fact that the first page (front and back) of the condominium mortgage in the Jefferson Parish mortgage records is a photocopy, while the last page is an original;" (2) "The Assignment of Proceeds of Contract in which Southern Savings agreed to forbear from foreclosure over a month before the condominium mortgage was, according to the R.T.C./Southern Savings, executed in order to obtain forbearance;" and (3) "The response from Oster & Wegener that the R.T.C. seized all of the Oster & Wegener files in December 1990 or January 1991, including the files relating to the $ 114,000 loan and the condominium mortgage." n11

n11 Peyton Place did not include the appraisal sketches discussed in its First Memorandum in its Third Memorandum's list of "evidence obtained since trial." Because Peyton Place does not mention the sketches in its brief on appeal, we do not consider them as a basis for its 60(b)(2) claim.

[**11]

Peyton Place all but concedes that the fact that the first page of the condominium mortgage in the Jefferson Parish mortgage records is a photocopy is not newly discovered evidence, stating in its brief on appeal that "the physical evidence of alteration on the first page of the mortgage is not newly discovered evidence, but evidence that was already entered into evidence at trial." Although the fact that the first page of the recorded mortgage is a photocopy was not mentioned at trial, evidence at trial showed that Peyton Place did have access to the document. n12 Peyton Place did not contend in its memoranda in support of its Rule 60(b)(2) motion or in its brief on appeal that it did not have access to the document either before or during the trial. Therefore, we conclude that Peyton Place failed to demonstrate to the district court that it could not have obtained the information before or during the trial even if it had exercised due diligence. *See Longden, 979 F.2d at 1103* (affirming denial [*772] of Rule 60(b)(2) motion in part because movant did not show due diligence).

n12 When asked about the condominium mortgage at trial, Robert Guastella testified that he, Charles Kovacs, and Donald Guastella "went down to the Mortgage Office" and "that's when we found it." When asked about the condominium mortgage, Donald Guastella testified that: "I saw it across the river in the Mortgage Office [in Gretna]."

[**12]

Peyton Place contends on appeal that the "Assignment of Proceeds of Contract and the forbearance agreement referred to in it were not found until after the trial and judgment." However, in its Second Memorandum, Peyton Place stated that it obtained a copy of the assignment of proceeds of contract containing the forbearance agreement "from the records of Jefferson Parish." Peyton Place has never contended that it did not have access to this document either before or during the trial. Therefore, we conclude that Peyton Place failed to demonstrate to the district court that it could not have obtained a copy of the contract and agreement contained therein before or during the trial even if it had exercised due diligence. *See id.*

Peyton Place contends on appeal that: "The fact that the Oster & Wegener files were seized by the R.T.C. years before trial was not discovered until after trial." However, in its Third Memorandum, Peyton Place describes how it obtained this information, stating: "Peyton Place, Inc. served a subpoena duces tecum on the law firm of Oster & Wegener for its files concerning the $ 114,000 loan from Southern Savings Bank to Robert Guastella and for the "duplicate [**13] original' and other documents relating to the Peyton Place condominium mortgage." In response to the subpoena, Peyton Place notes, Oster & Wegener sent a letter stating: " "In response to the Subpoena issued by you ... please be advised that all of the documents requested were seized by the Resolution Trust Corporation in December of 1990 or January 1991... If any of the alleged documents exist, it would be in the possession of the

R.T.C.' " (ellipses in Third Memorandum). Peyton Place has never contended that it could not have obtained this information either before or during the trial. Therefore, we conclude that Peyton Place failed to demonstrate to the district court that it could not have obtained the information before or during the trial even if it had exercised due diligence, and hold that the district court did not abuse its discretion in refusing to grant Peyton Place's Rule 60(b)(2) motion. *See id.*

B

Peyton Place next contends that the district court's denial of its Rule 60(b) motion was erroneous in light of the evidence of the RTC's misconduct. Under Rule 60(b)(3), "A party making a Rule 60(b)(3) motion must "establish by clear and convincing evidence (1) that the [**14] adverse party engaged in fraud or other misconduct and (2) that this misconduct prevented the moving party from fully and fairly presenting his case.' " *Washington v. Patlis, 916 F.2d 1036, 1039 (5th Cir.1990)* (quoting *Montgomery v. Hall, 592 F.2d 278, 278-79 (5th Cir.1979)); accord Diaz v. Methodist Hosp., 46 F.3d 492, 496 (5th Cir.1995).* "The purpose of the rule is to afford parties relief from judgments which are unfairly obtained, not those which may be factually incorrect." *Diaz, 46 F.3d at 496; accord Johnson v. Offshore Exploration, Inc., 845 F.2d 1347, 1359* (5th Cir.), *cert. denied, 488 U.S. 968, 109 S. Ct. 497, 102 L. Ed. 2d 533 (1988).*

Peyton Place argues that the "R.T.C.'s failure to produce critical documents is sufficient misconduct to

require relief from the judgment under Rule 60(b)(3)." In its brief on appeal, Peyton Place claims: (1) "The R.T.C. did not produce a *single* document from the Oster & Wegener files," which it contends "must" contain a copy of the condominium mortgage, "likely" contain a duplicate original of the mortgage, and "in all likelihood" contain "some communication or memo or notes ... concerning the purpose or intent of [**15] the condominium loan;" (2) "The R.T.C. failed to produce the Southern Savings condominium file," speculating that "surely, there must have been a copy of the condominium mortgage in the files of Southern Savings files [sic], or at least one document dealing with the condominium mortgage;" and (3) "The R.T.C. failed to produce or disclose the forbearance agreement or the Assignment of Proceeds of Contract referring to the forbearance agreement," opining that "it is not credible" that Southern Savings and Oster & Wegener's files did not contain a copy.

"Our cases have held that a party may engage in rule 60(b)(3) misconduct if he fails [*773] to disclose evidence he knows about and the production of such evidence was clearly called for "by any fair reading' of the discovery order." *Montgomery, 592 F.2d at 279* (quoting *Rozier v. Ford Motor Co., 573 F.2d 1332, 1341 (5th Cir.1978))*. Even if we assume that Peyton Place clearly asked the RTC for all the documents on which it bases its Rule 60(b)(3) claim, n13 Peyton Place did not provide the district court with "clear and convincing evidence" that the RTC engaged in any misconduct concerning those documents because it did not show by [**16] clear and convincing

evidence that the RTC has ever had the documents in its possession. As support for its claim, Peyton Place relied solely on the letter it received from Oster & Wegener, which merely states that all documents concerning Southern Savings that were in the law firm's possession were seized by the RTC and that "if any of the alleged documents exists, it would be in the possession of the R.T.C." Because Peyton Place did not provide the district court with clear and convincing evidence that any of these documents have ever been in the RTC's possession, its Rule 60(b)(3) claim with respect to the documents fails. *Compare Rozier, 573 F.2d at 1341-42* (reversing district court's denial of appellant's Rule 60(b)(3) claim based on affidavit showing that appellee knew that it had requested document in its possession but failed to produce it).

> n13 We note that Robert Guastella did not testify that Peyton Place subpoenaed Oster & Wegener's files; indeed, Peyton Place contends on appeal that it did not learn that the RTC had seized those files until after the district court entered its judgment. *See Montgomery, 592 F.2d at 279* (rejecting 60(b)(3) claim because discovery order could not fairly be read to require disclosure of evidence).

[**17]

Even if Peyton Place had shown that the RTC possessed an original duplicate of the mortgage, a photocopy of the mortgage, or any other document it

hypothesizes might have been seized by the RTC, Peyton Place did not provide the district court with clear and convincing evidence that the RTC's failure to produce any of these documents prevented it from fully and fairly presenting its case. *See Washington, 916 F.2d at 1039* (requiring that movant support Rule 60(b)(3) motion based on misconduct with clear and convincing evidence that misconduct prevented movant from fully and fairly presenting its case). Peyton Place can only speculate that an original duplicate or additional copy of the mortgage would have supported its claims. Similarly, it can only suggest that any communication, memo, or notes regarding the purpose or intent of the condominium loan that might have been in the RTC's possession would bolster its argument. Peyton Place can establish by clear and convincing evidence the contents of the forbearance agreement, but it cannot argue that the RTC's failure to produce this document prevented Peyton Place from fully and fairly presenting its case because this document was [**18] available to Peyton Place at trial. *See supra* part II.A.; *see also Diaz, 46 F.3d at 497* (affirming Rule 60(b)(3) denial because appellant had "independent access" to information allegedly withheld from her, information was not "under the exclusive control of the Appellees," and it was "likely that a more focused effort by Appellant could have uncovered the evidence prior to trial"). Therefore, we conclude that Peyton Place's Rule 60(b)(3) claim also fails, and hold that the district court did not abuse its discretion in refusing to grant Peyton Place's Rule 60(b)(3) motion.

C

Lastly, Peyton Place contends that it is entitled to relief from the district court's judgment under Rule 60(b)(6), which provides that a court may grant such relief for "any other reason justifying relief from the operation of the judgment." Section (b)(6)'s "any other reason" language refers to any reason other than those contained in the five enumerated grounds on which a court may grant a Rule 60(b) motion. *Klapprott v. United States, 335 U.S. 601, 614-615, 69 S. Ct. 384, 390, 93 L. Ed. 266 (1949); Wilson v. Johns-Manville Sales Corp., 873 F.2d 869, 872* (5th Cir.), *cert. denied, 493 U.S. 977,* [**19] *110 S. Ct. 504, 107 L. Ed. 2d 506 (1989).* "Rule 60(b)(6) "is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding [*774] clauses.'" *Harrell v. DCS Equip. Leasing Corp., 951 F.2d 1453 (5th Cir.1992)* (quoting). "Relief under this section is granted "only if extraordinary circumstances are present.' " *American Totalisator Co. v. Fair Grounds Corp., 3 F.3d 810, 815-16 (5th Cir.1993)* (quoting *Picco v. Global Marine Drilling Co., 900 F.2d 846, 851 (5th Cir.1990)).*

Peyton Place contends that the district court erroneously refused to exercise its equitable powers under Rule 60(b)(6) to consider "the evidence obtained after the trial and judgment (the photocopied first page in the mortgage records, the R.T.C.'s seizure of the Oster & Wegener files, and the Assignment of Proceeds of Contract referring to the forbearance agreement)." Peyton Place claims in its brief on appeal that (1) it would be "unconscionable" to enforce an obviously altered mortgage, (2) "if it was a lack of due

diligence for Peyton Place to [fail to] check the mortgage records before trial, it was an equal lack of due diligence for the R.T.C. [**20] not to check the mortgage records before filing the petition for foreclosure," and (3) the inequity of enforcing an obviously altered mortgage outweighs the inequity of granting Peyton Place relief from the judgment based on evidence that it could have obtained and presented to the district court at trial had it exercised due diligence.

Even if we assume what Peyton Place fails to argue, that Peyton Place has stated a Rule 60(b)(6) claim distinct from its Rule 60(b)(2) and (b)(3) claims, its Rule 60(b)(6) claim fails because we have expressly held that a district court's equitable powers under section (b)(6) do not extend to considering evidence that could have been presented at trial. "This clause of the Rule provides "a grand reservoir of equitable power to do justice in a particular case,' but that well is not tapped by a request to present evidence that could have been discovered and presented at trial through the exercise of due diligence." *United States v. 329.73 Acres of Land, More or Less, 695 F.2d 922, 926 (5th Cir.1983)* (quoting). Had it exercised due diligence, Peyton Place could have discovered and presented at trial the photocopied first page in the mortgage records, [**21] the RTC's seizure of the Oster & Wegener files, and the assignment of proceeds of contract referring to the forbearance agreement. *See supra* part II.A. Therefore, the district court did not abuse its discretion in refusing to grant Peyton Place's Rule 60(b)(6) motion. *See 329.73 Acres of Land, 695 F.2d at 926* (affirming denial of Rule 60(b)(6)

motion based on evidence presented after judgment because evidence could have been presented before judgment through the exercise of due diligence). n14

n14 In rejecting the Rule 60(b)(6) claim, the court in *329.73 Acres of Land* noted that the movants "seek to reopen a trial to make proof from which their claim of obvious error springs." *Id. at 926.* The court emphasized that "Rule 60(b) does not allow such supplementary trials." *Id.*

III

Peyton Place also contends that the district court erred in denying its Rule 59 motion for a new trial. The district court has discretion to grant a new trial under Rule 59(a) of the Federal Rules of Civil Procedure [**22] when it is necessary to do so "to prevent an injustice." *United States v. Flores, 981 F.2d 231, 237 (5th Cir.1993)* (quoting *Delta Eng'g Corp. v. Scott, 322 F.2d 11, 15-16 (5th Cir.1963), cert. denied, 377 U.S. 905, 84 S. Ct. 1164, 12 L. Ed. 2d 176 (1964)).* The district court's decision to grant or deny a Rule 59(a) motion will be reversed only for an abuse of discretion. *Flores, 981 F.2d at 237; Treadaway v. Societe Anonyme Louis-Dreyfus, 894 F.2d 161, 164 (5th Cir.1990).*

"Ordinarily, a district court's decision not to grant a new trial under Rule 59(a) is not appealable." *Youmans v. Simon, 791 F.2d 341, 349 (5th Cir.1986); accord State*

Nat'l Bank v. United States, 488 F.2d 890, 893 (5th Cir.1974); 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2818 (1995) (citing *Youmans* and *State Nat'l Bank*). "An appeal of the denial of a Rule 59(a) motion for a new trial merely restates the attack on the merits of the final judgment. It is from the final judgment that the appeal should be taken." *Youmans, 791 F.2d at 349* (citing *Urti v. Transp. Commercial Corp., 479 F.2d 766, 769 (5th Cir.1973)).* "The only [**23] exception to this rule is when "new matters arise after the entry of the judgment.' " *Id.*

[*775] Peyton Place argues the same grounds for its Rule 59(a) motion as it did for its Rule 60(b)(2) motion, that the district court erred in not granting a new trial based on the evidence it listed in its Third Memorandum as "new evidence obtained by Peyton Place, Inc. since the trial." We have held that the denial of a motion for a new trial on the ground of newly discovered evidence is itself appealable. *Fallen v. United States, 249 F.2d 94, 95 (5th Cir.1957); see also* 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2818 (1995) (citing *Fallen*). However, to prevail on a Rule 59(a) claim based on newly discovered evidence, the movant must have been excusably ignorant of the facts at the time of the trial despite due diligence to learn about them. *See Owens v. International Paper Co., 528 F.2d 606, 611 (5th Cir.1976)* (affirming denial of Rule 59(a) motion based on newly discovered evidence because movants failed to make requisite showings that they were excusably ignorant of evidence until after trial and had employed reasonable

diligence [**24] to obtain it). Having determined that Peyton Place did not adequately demonstrate to the district court that it could not have discovered the evidence forming the basis for its Rule 60(b)(2) motion before or during trial even if it had exercised due diligence, *see* part II.A., we conclude that Peyton Place could not prevail on its Rule 59(a) claim based on the same evidence. Therefore, we hold that the district court did not abuse its discretion in refusing to grant Peyton Place's Rule 59(a) motion for a new trial. *See Owens, 528 F.2d at 611* (affirming denial of Rule 59(a) motion because movants had not demonstrated that motion was based on evidence that they "had employed reasonable diligence to ascertain" before trial).

IV

For the foregoing reasons, we AFFIRM the district court's denial of Peyton Place's Rule 60(b) motion and Rule 59(a) motion.

LEXSEE 2001 Ohio App. LEXIS 2985

HERMAN W. ACHAUER, et al.,
Plaintiff-Appellees,
-vs-
MONROE GUARANTY INSURANCE COMPANY, et al.,
Defendant-Appellants.

Case No. CT2000-0038

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, MUSKINGUM COUNTY

2001 Ohio App. LEXIS 2985

June 6, 2001, Date of Judgment Entry

PRIOR HISTORY:
[*1] CHARACTER OF PROCEEDING: Civil appeal from the Muskingum County Common Pleas Court. Case No. CH2000-0363.

DISPOSITION:
Affirmed.

COUNSEL:
For Plaintiff-Appellees: JAY F. VISNEL, Zanesville, Ohio.

For Defendant-Appellants: HARRY A. TIPPING, LESLIE A. WEIGAND, Akron, Ohio.

JUDGES:
Hon. William B. Hoffman, P.J., Hon. John W. Wise, J., Hon. John F. Boggins, J. Boggins, J. Hoffman, P.J. and Wise, concur.

OPINION BY:
John F. Boggins

OPINION:

Boggins, J.

Appellant, Monroe Guaranty Insurance Company issued a commercial automobile liability policy of insurance to Zandex, Inc. which was in effect at the time of the motor vehicle accident which is the subject of this action. Appellee's decedent, Patricia Achauer, was an employee of Zandex, Inc. on April 20, 1998, when she was involved the automobile accident which resulted in her death. In January, 1999, two letters were sent to Appellant advising it that the tortfeasor and the underinsured motorist carrier had tendered their policy limits for settlement in connection with the subject accident and requesting written permission to accept said settlement offers. On January 21, 1999, Appellant sent written notification to Appellees that

it was Appellant's position [*2] that the Estate was not entitled to UM/UIM coverage under the policy. Appellant also notified Appellees that it was not waiving its right to any other provision of the policy. On January 27, 1999, Appellees sent another letter to Zandex, Inc. advising it that such correspondence represented a potential uninsured/underinsured motorist claim on behalf of the Estate of Patricia Achauer. On June 3, 1999, Appellees accepted the settlement offers of the tortfeasor and the underinsured carrier and executed two releases in consideration of a total of $ 125,000.00. On August 23, 1999, Appellees sent written notice to Appellant of an uninsured/underinsured motorist claim in accordance with the Ohio Supreme Court's decision in *Scott-Pontzer v. Liberty Mutual Fire Ins. Co. (1999), 85 Ohio St. 3d 660, 710 N.E.2d 1116.* Appellant maintained its denial of coverage of the policy. Appellees commenced litigation in this matter on April 13, 2000. The trial court granted summary judgment in favor of Appellees without issuing any findings of fact or conclusions of law on November 16, 2000, followed by a Nunc Pro Tunc Entry on December 8, 2000, which included language stating that such was a [*3] final appealable order. It is from this decision that Appellant has filed the instant appeal assigning the following errors:

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT PRAYED FOR BY APPELLEE, ON ACCOUNT THAT GENUINE ISSUES OF MATERIAL FACT REMAIN IN DISPUTE BETWEEN THE PARTIES REGARDING

WHETHER APPELLEES EXECUTED A FULL AND FINAL RELEASE ON JUNE 3, 1999, WHEN THEY SETTLED WITH THE TORTFEASOR'S INSURER AND CONSEQUENTLY DESTROYED DEFENDANT, MONROE GUARANTY INSURANCE COMPANY'S RIGHT OF SUBROGATION, AND FURTHERMORE, ON ACCOUNT THAT THE EXISTENCE OF SUCH MATERIAL FACTUAL DISPUTES PREVENTS REASONABLE MINDS FROM COMING TO ONLY ONE CONCLUSION THAT IS ADVERSE TO APPELLANT.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT PRAYED FOR BY APPELLEE, ON ACCOUNT THAT GENUINE ISSUES OF MATERIAL FACT REMAIN IN DISPUTE BETWEEN THE PARTIES REGARDING WHETHER THE SCOTT-PONTZER DECISION CAN BE APPLIED RETROACTIVELY TO THE PRESENT MATTER AND FURTHERMORE, ON ACCOUNT THAT THE EXISTENCE OF SUCH MATERIAL FACTUAL DISPUTES PREVENTS REASONABLE MINDS FROM COMING TO ONLY ONE CONCLUSION THAT IS ADVERSE TO APPELLANT.

Summary judgment proceedings [*4] present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc. (1987), 30 Ohio St. 3d 35, 36, 506 N.E.2d 212.* Civ. R. 56©) states in pertinent part: Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written

stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law ... A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden [*5] of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall (1997), 77 Ohio St. 3d 421, 429, 674 N.E.2d 1164,* citing *Dresher v. Burt (1966), 75 Ohio St. 3d 280, 662 N.E.2d 264.* It is based upon this standard we review Appellants' Assignments of Error.

II.

The Court will address Appellant's second assignment of error first. Appellant claims that the Ohio Supreme Court's decision in *Scott-Pontzer, supra,* cannot be applied retroactively. We disagree. Appellant argues that prior to *Scott-Pontzer, supra,* the existing law in Ohio was different than that subsequent to such decision. However, the Supreme [*6] Court in *Scott-Pontzer, supra,* did not create new law. Instead, it merely interpreted the language of an already existing contract of insurance applying the rules of construction.

Furthermore, the Ohio Supreme Court has previously applied their holding in *Scott-Pontzer, supra,* retroactively in the case of the *Estate of Dillard v. Liberty Mutual Insurance Company (1999), 86 Ohio St. 3d 316, 715 N.E.2d 126,* to an action that was originally commenced on January 27, 1997. Accordingly, based on the foregoing, we find that the trial court did not err in granting appellee's Motion for Summary Judgment. This Court therefore finds appellants Assignment of Error II not well-taken and overrules same.

I.

Appellant argues that the trial court improperly granted summary judgment in favor of appellees as the whether appellees executed Full and Final Releases on June 3, 1999, in derogation of the policy provisions, thereby destroying appellant's right of subrogation. As the trial court did not state it reasons for sustaining appellee's motion for summary judgment, it is unclear whether the trial court

based its decision on the fact that the releases signed [*7] in this matter were not full and final or whether it found that appellant failed to protect its interest by complying with the terms of its policy. We find that appellant failed to protect its subrogation rights under the policy, which states: Ohio Uninsured Motorists Coverage - Bodily Injury E. Changes in conditions 2. DUTIES IN THE EVENT OF ACCIDENT, CLAIM, SUIT OR LOSS is changed by adding the following: ©) A person seeking Uninsured Motorists Coverage must also promptly notify us in writing of a tentative settlement between the "insured" and the insurer of the vehicle described in paragraph F.3.b. of the definition of "uninsured motor vehicle" and allow us 30 days to advance payment to that insured in an amount equal to the tentative settlement to preserve our rights against the insurer, owner or operator of such vehicle described in paragraph F.3.b. of the definition of "uninsured motor vehicle".

Appellees notified appellant on December 30, 1998, and again on January 27, 1999, of its claim. Appellee notified appellant on January 19, 1999 of its intention to settle. In response, Appellant notified Appellees that it was denying coverage under the policy. Appellant also stated [*8] in said notification of denial that it was not waiving its right to any other provision of the policy. Appellant argues that it was reasonably justified in denying coverage for the reasons set forth in its second assignment of error which we have previously addressed and overruled. Appellant had the option in this matter to tender payment in accordance with the above policy provision but chose not to do so. Appellees did not accept the tender of settlement

from the tortfeasor in this matter until June 3, 1999, over four months from the date of notification, and three months after the 30 day period for advance payment had passed. We find that Appellant failed to protect its subrogation interest and waived same by failing to advance payment in this matter in accordance with the terms of its policy.

For the above-stated reasons, we find Appellant's Assignment of Error I not well-taken and hereby overrule same. The decision of the trial court is affirmed.

By Boggins, J. Hoffman, P.J. and Wise, concur.

35 Ohio St. 3d 208, *; 519 N.E.2d 1380, **;
1988 Ohio LEXIS 46, ***

LEXSEE 35 Ohio St.3d 208

KING, EXR.,
APPELLANT,
v
NATIONWIDE INSURANCE COMPANY,
APPELLEE .

No. 87-595

Supreme Court of Ohio

35 Ohio St. 3d 208; 519 N.E.2d 1380; 1988 Ohio LEXIS 46

March 2, 1988, Decided

PRIOR HISTORY:
[***1]

APPEAL from the Court of Appeals for Summit County.

As indicated from the record, including the stipulations of the parties, Dale Gordon died of personal injuries sustained as the result of an automobile accident that occurred on May 10, 1983. The driver of the other vehicle involved in the accident was the negligent party. At the time of the accident, Gordon was driving an automobile

owned by Mildred Foster, a co-worker. Gordon was in the course of his employment with the Akron-Summit Community Action Agency ("ASCAA").

Gordon's estate sought compensation for Gordon's injuries and death, and was paid the maximum amount of $ 15,000 available under the negligent driver's bodily injury insurance policy, and received $ 35,000 under Foster's underinsured motorist insurance coverage. Plaintiff-appellant, H. Eugene King, executor of Gordon's estate, sought further recovery under a contract of insurance issued by defendant-appellee, Nationwide Insurance Company, to ASCAA, which provided underinsured motorist insurance in the amount of $ 250,000.

Upon Nationwide's denial of his claim, King filed this declaratory judgment action seeking, *inter alia,* a declaration that Gordon was [***2] an insured under the Nationwide policy and requesting an order for Nationwide to submit to arbitration of the claim.

Pursuant to motions for summary judgment filed by both parties, the trial court entered summary judgment for King, declaring that Nationwide's underinsured motorist provision encompassed all ASCAA employees (including Gordon), and ordered arbitration. The trial court further found no just reason for delay and Nationwide appealed.

The court of appeals reversed, finding that the policy covered only employees designated as drivers in named vehicles owned by ASCAA, and that, as Gordon was not a designated driver, he was outside the scope of coverage afforded by the policy.

35 Ohio St. 3d 208, *; 519 N.E.2d 1380, **;
1988 Ohio LEXIS 46, ***

The cause is now before this court pursuant to the allowance of a motion to certify the record.

DISPOSITION:

Judgment reversed.

SYLLABUS:

Where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured. (*Faruque v.. Provident Life & Acc. Ins. Co. [1987], 31 Ohio St. 3d 34, 31 OBR 83, 508 N.E. 2d 949,* [***3] syllabus; *Thompson v.. Preferred Risk Mut. Ins. Co. [1987], 32 Ohio St. 3d 340, 342, 513 N.E. 2d 733, 736,* and cases cited therein, followed.)

COUNSEL:

Scanlon & Gearinger Co., L.P.A., Timothy F. Scanlon and *Robert A. Royer,* for appellant.

Robert J. Drexler, for appellee.

JUDGES:

MOYER, C.J. SWEENEY, LOCHER, DOUGLAS, WRIGHT and H. BROWN, JJ., concur. HOLMES, J., dissents.

OPINION BY:

MOYER

OPINION:

[*209] [**1381]

This appeal raises the question whether underinsured motorist coverage provided in an employer's insurance policy extends to a deceased employee whose fatal injuries were sustained in the course of employment as the result of an automobile accident with an underinsured motorist, where the employee was not listed as a designated driver nor was he in an auto named under the policy issued to his employer.

For the reasons that follow, we hold that the employee, Gordon, was covered by his employer's insurance policy.

I.

A.

The insurance policy before the court is a standard form policy, applicable to individuals and families and, apparently, routinely issued to corporate and other legal entities as well.

The policy defines certain general terms, in pertinent part, as follows:

"DEFINITIONS

"The [***4] language of this insurance policy includes certain common words for easy understanding. They have exactly defined meanings, however. In this policy:

"1. the words 'YOU' and 'YOUR' mean or refer to the policyholder first named in the attached Declarations, and

include that policyholder's spouse if living in the same household.

" [**1382] 2. the words 'WE,' 'US,' 'OUR,' and 'THE COMPANY' mean or refer to the Nationwide Mutual Insurance Company.

"3. the words 'THE INSURED,' 'AN INSURED,' and 'ANY INSURED' mean or refer to the persons and organizations specifically indicated as entitled to protection under the coverage being described.

"4. the words 'YOUR AUTO' mean the vehicle or vehicles described in the attached Declarations.

"* * *

"7. the word 'OCCUPYING' means in, upon, entering, or alighting from a motor vehicle."

The insuring provisions of the Nationwide contract provide coverage against physical damage to "your auto"; "auto liability (for damage or injury to others caused by your auto)"; "medical payments (medical expenses payable regardless of fault)"; "family compensation (medical, confinement, and death benefits, payable regardless of fault)"; "uninsured motorists (for [***5] bodily injury caused by uninsured motorists)"; and "comprehensive family liability (for damage or injury to others from non vehicular causes)."

By endorsement, ASCAA's uninsured motorist coverage was extended [*210] to cover bodily injury caused by underinsured motorists. The uninsured motorist provision provides, in pertinent part:

"COVERAGE

"Under this coverage, we will pay bodily injury damages that you or your legal representative are legally entitled to recover from the owner or driver of an * * * [underinsured] motor vehicle. Damages must result from an accident arising out of the ownership, maintenance, or use of the * * * [underinsured] vehicle. Bodily injury means bodily injury, sickness, disease, or death.

"Relatives living in your household also have this protection. Anyone else is protected while occupying:

"1. your auto.

"2. a motor vehicle you do not own, while it substitutes temporarily for your auto. Your auto must be out of use because of breakdown, repair, servicing, loss, or destruction.

"3. a four-wheel motor vehicle newly acquired by you. The coverage applies only during the first 30 days you own the vehicle, unless it replaces your auto.

"4. [***6] any other motor vehicle while it is being operated by you or a relative living in your household. However, the vehicle must not be owned or furnished to you or a relative living in your household for regular use.

"This coverage also protects others for damages they may be legally entitled to recover because of bodily injury suffered by an insured.

"In any * * * [underinsured] motorists claim, we will jointly determine with the insured or his legal representative whether there is legal right to recover damages, and if so in what amount. If agreement cannot be reached with regard to liability or amount of damages, the matter will be decided by arbitration. * * *

"* * *

"COVERAGE EXCLUSIONS

"This * * * [Underinsured] Motorists insurance does not apply as follows:

"* * *

"4. It does not apply to bodily injury suffered while occupying a motor vehicle owned by you or a relative living in your household, but not insured for * * * [Underinsured] Motorists coverage under this policy. * * *"

In the absence of policy declarations in the record, the parties stipulated, *inter alia,* to the following facts:

"1. * * * the Akron-Summit Community Action Agency ('ASCAA') was the [***7] named insured under a contract of insurance issued by the defendant, Nationwide Insurance Company.

"* * *

"10. * * * [Mildred Foster's] vehicle was not furnished to Dale Gordon or the ASCAA for regular use.

"* * *

[**1383] "12. Dale Gordon was not named as a designated driver under the auto policies issued to * * * [ASCAA].

"13. * * * [Mildred Foster] * * * was not named as a driver in any of the Nationwide policies issued to ASCCA [*sic*].

"* * *

"15. Dale Gordon was not a resident of the households of any of the drivers named as drivers of any of the vehicle [*sic*] insured by Nationwide for ASCAA.

"16. The five vehicles insured by Nationwide for ASCCA [*sic*] were all operational and in use by others when this accident occurred.

"17. Each driver for the ASCCA [*sic*] was listed by name for the vehicle they [*sic*] were going to drive under a category which stated 'List Each Drive [*sic*] in Household.'"

No list of designated drivers or [*211] named vehicles was made a part of the insurance policy or otherwise incorporated by reference into the policy. Nor do the

stipulations or any other declaration indicate what significance, if any, was to be given the fact [***8] that Dale Gordon was not named as a designated driver under the auto policies and that each driver for ASCAA was "listed by name for the vehicle they [*sic*] were going to drive."

Nationwide argues that we should interpret the stipulations to mean that only those drivers who were listed by name for the specific vehicles they were going to drive for ASCAA were covered by the Nationwide policy and that Dale Gordon was not covered because he was not named as a designated driver. The difficulty we have in adopting Nationwide's argument is that there simply is no language in the policy or in the stipulations that would cause us to conclude that such a legal conclusion flows from the facts before us.

B.

As in all cases in which insurance coverage is provided by an insurance policy, the issue in this case will be determined by a "* * * reasonable construction [of the contract] in conformity with the intention of the parties as gathered from the ordinary and commonly understood meaning of the language employed." *Dealers Dairy Products Co. v.. Royal Ins. Co. (1960), 170 Ohio St. 336, 10 O.O. 2d 424, 164 N.E. 2d 745,* paragraph one of the syllabus; *Bobier v.. National Cas.* [***9] *Co. (1944), 143 Ohio St. 215, 28 O.O. 138, 54 N.E. 2d 798,* paragraph one of the syllabus. However, it is well-settled that, where provisions of a contract of insurance are reasonably

susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured. *Faruque v.. Provident Life & Acc. Ins. Co. (1987), 31 Ohio St. 3d 34, 31 OBR 83, 508 N.E. 2d 949,* syllabus; *Thompson v.. Preferred Risk Mut. Ins. Co. (1987), 32 Ohio St. 3d 340, 342, 513 N.E. 2d 733, 736,* and cases cited therein.

Considering the policy language as a whole, the general intent of the insurance contract as revealed by the stipulations appears to have been to insure ASCAA as a legal entity against liability arising from the use of certain named ASCAA vehicles when driven by designated drivers.

Although the parties dispute whether the Nationwide policy insures all ASCAA employees, as King argues, or only specific employees, as Nationwide argues, we consider neither position to be entirely dispositive. Other courts presented with family-oriented language in policies issued to partnerships and corporations have interpreted the scope of [***10] underinsured motorist coverage both ways. n1 The parties' stipulation [**1384] identifies ASCAA [*212] as the "named insured." The policy defines "YOU" as the "policyholder first named." Therefore, neither the employees as a whole nor the group of "designated drivers" may be interpreted as the entity to which the word "YOU" refers. We conclude that ASCAA, as a legal entity, is the "YOU" referred to in the policy.

----------Footnotes----------

n1 Some courts have agreed with King that because insurers have inserted family-oriented policy language insuring against bodily injury in contracts issued to partnerships, such language must be intended to provide coverage to individuals. *E.g., Hartford Acc. & Indemn. Co. v. Huddleston (Ky. App. 1974), 514 S.W. 2d 676* (family-oriented language in policies issued to partnerships causes the underinsured motorist provisions of the policies to also insure the partners and their families). Other courts, in cases cited by Nationwide, have found, to the contrary, that employees are not covered under underinsured motorist provisions of policies issued to partnerships, *e.g., Testone v. Allstate Ins. Co. (1973), 165 Conn. 126, 328 A. 2d 686,* and not covered under other property damage and bodily injury provisions in policies issued to partnerships, *e.g., Rosen v.. Natl. Union Fire Ins. Co. (Fla. App. 1971), 249 So. 2d 701,* and corporations, *e.g., Harleysville Mut. Ins. Co. v. Five Points Fire Co. No. 1, Inc. (Del. Super. Ct. 1982), 444 A. 2d 304; stirratt* v.. *Kane (1966), 273 Minn. 205, 140 N.E. 2d 345.* At least one court has found the intent to insure corporations so clear and unambiguous that family-oriented language in a policy issued to a corporation was declared a nullity. *Pearcy v.. Travelers Indemn. Co. (Fla. App. 1983), 429 So. 2d 1298.*

----------End Footnotes----------

[***11]

C.

As noted by the trial court, the critical language of the underinsured motorist provisions pertinent to this case states:

> "Under this coverage, we will pay bodily injury damages that you or your legal representative are legally entitled to recover from the owner or driver of an * * * [underinsured] motor vehicle. * * *
>
> "Relatives living in your household also have this protection. *Anyone else is protected while occupying*:
>
> "* * *
>
> "4. *any other motor vehicle while it is being operated by you* * * *." (Emphasis added.)

An important exclusion states that the underinsured motorist insurance:

> "4. * * * does not apply to bodily injury suffered while occupying a motor vehicle owned by you or a relative living in your household, but not insured for * * * [Underinsured] Motorists coverage under this policy. * * *"

Examination of this policy language reveals that the question of coverage turns upon the meaning of the undefined phrases "[r]elatives living in your household" and "[a]nyone else."

> "Common words appearing in a written instrument will be given their ordinary meaning unless

> manifest absurdity results, or unless some other meaning is clearly evidenced from the [***12] face or overall contents of the instrument."

Alexander v. Buckeye Pipe Line Co. (1978), 53 Ohio St. 2d 241, 7 O.O. 3d 403, 374 N.E. 2d 146, paragraph two of the syllabus. Because "you" and "your" refer to ASCAA as a legal entity, the ordinary meaning of the phrase "[r]elatives living in your household" used in the policy is "manifestly absurd." However, in the context of the policy as a whole, the phrase "[r]elatives living in your household" may be interpreted as referring to all employees of ASCAA, as referring to designated drivers only, or as a nullity. Therefore, the phrase is ambiguous and must be construed in favor of the insured. *Faruque, supra; Thompson, supra.*

If the phrase "[r]elatives living in your household" is construed to refer to all employees of ASCAA, the exclusion cited above precludes coverage because Gordon was occupying a motor vehicle owned by another employee-"relative," which vehicle was not insured under the policy. Such construction in favor of the insurer is contrary to law. Alternatively, if the phrase is construed either to refer to a designated list of "drivers in the household" or to be a nullity, under-insured motorist coverage [***13] is extended to Gordon. A construction of [r]elatives living in your household" as referring to the designated drivers listed as "drivers in the household" [*213] would be in harmony with the intent of the parties to establish a specific and limited category of individuals entitled to bodily injury protection under nearly all the

categories of coverage afforded under the policy. n2 However, we need not reach that issue because, under the underinsured motorist coverage, whether the phrase "[r]elatives living in [**1385] your household" refers to designated drivers or is simply a nullity, we conclude that Gordon was an insured.

The stipulations establish that Foster's automobile was loaned to Gordon for use in the scope [***14] of his employment. As such, it was operated by and for ASCAA, the "YOU" referred to in the contract. Therefore, the policy language at issue places Gordon in the position of "anyone else" who is entitled to protection "* * * while occupying * * * any other motor vehicle while it is being operated by you [ASCAA] * * *." The

----------Footnotes----------

n2 In addition to insuring "YOU," the physical damage, medical payments, family compensation, and comprehensive family liability coverages described in the policy are extended, in part, to "[r]elatives living in your household." Auto liability coverage is also extended to "[a]nyone living in your household."

----------End Footnotes----------

express exclusions from underinsured motorist coverage do not apply. n3

Nationwide's limiting interpretation of the underinsured motorist provision is founded, in part, upon an unstated assumption that its policy insures the same designated individuals and named vehicles under all coverages. Yet, the precise language used in the insurance

----------Footnotes----------

n3 The coverage exclusions from under-insured motorist coverage state in their entirety:

"This Uninsured Motorists insurance does not apply as follows:

"1. It does not apply to use of any vehicle by an insured to carry persons or property for a fee. However, shared-expense car pools will not be considered carrying persons for a fee.

"2. It does not apply to use of any vehicle by an insured without permission of the owner.

"3. It does not apply to bodily injury of any insured if he or a legal representative settles, without our written consent, with anyone who may be liable for the injury.

"4. It does not apply to bodily injury suffered while occupying a motor vehicle owned by you or a relative living in your household, but not insured for * * * [Underinsured] Motorists coverage under this policy. It does not apply to bodily injury from being hit by any such vehicle."

----------End Footnotes----------

[***15]

contract implies a different result and supports the broad construction of the underinsured motorist coverage prompted by our finding of ambiguity.

The insurance contract's definition of "THE INSURED," "AN INSURED," and "ANY INSURED," as a person "* * * specifically indicated as entitled to protection under the coverage being described," implicitly recognizes that different provisions of the policy may specifically entitle differing groups of persons and automobiles to protection, depending upon the coverage described. This court has previously recognized that the actual language of uninsured or underinsured motorist provisions, because broadly written, may cause the coverage to exceed the scope impliedly intended, as evidenced by the policy declaration. *Ohio Farmers Ins. Co. v.. Wright (1969), 17 Ohio St. 2d 73, 46 O.O. 2d 404, 246 N.E. 2d 552,* paragraph one of the syllabus; n4 *Kish v.. Central Natl.* [***16] *Ins.* [*214] *Group (1981), 67 Ohio St. 2d 41, at 44 and 49, 21 O.O. 3d 26, at 28 and 31, 424 N.E. 2d 288, at 291 and 293.*
Kvh...start here.....

n4 The first paragraph of the syllabus of *Ohio Farmers Ins. Co. v.. Wright (1969), 17 Ohio St. 2d 73, 46 O.O. 2d 404, 246 N.E. 2d 552,* recognizes that:

For example, the auto liability provisions for damage or injury to others caused by "your auto" cover "* * * damages resulting from the ownership, maintenance, [***17] loading or unloading of your auto." "YOUR AUTO" is defined in the policy as "the vehicle or vehicles described in the attached Declarations" -- here, the five vehicles stipulated by the parties. In addition to "your auto," the auto liability provisions are extended to also cover "a motor vehicle you do not own, while it substitutes temporarily for your auto * * * out of use because of breakdown, repair, servicing, loss, or destruction"; and newly acquired vehicles for the first thirty days. The underinsured motorist provisions not only encompass these categories but also reach an even broader group, including any other non owned vehicle not furnished for regular use, such as, in this case, Foster's automobile. [**1386] Moreover, we note that an express coverage exclusion found under the auto liability coverage which excludes "* * * bodily injury to an employee of any insured, while the employee is engaged in the activities of

"An endorsement to an automobile insurance policy by which the insurer agrees to pay to the insured all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury sustained by the insured caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile, in the absence of specific language of limitation, is not restricted in coverage to cases where the

named insured, at the time of his injury, is using an 'insured automobile' as defined in the endorsement."

----------End Footnotes----------

employment," is clearly absent from the underinsured motorist "COVERAGE EXCLUSIONS." In the construction of insurance contracts, "[w]here exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that [***18] that which is not clearly excluded from the operation of such contract is included in the operation thereof." *Home Indemnity Co. v.. Plymouth (1945), 146 Ohio St. 96, 32 O.O. 30, 64 N.E. 2d 248,* paragraph two of the syllabus. See, also, *Moorman v.. Prudential Ins. Co. (1983), 4 Ohio St. 3d 20, 22, 4 OBR 17, 19, 445 N.E. 2d 1122, 1124.* Accordingly, we conclude that Gordon was an insured under the underinsured motorist provisions of the Nationwide policy.

II

In addition to seeking a declaratory judgment, King requested that the trial court order Nationwide to arbitrate his claim. The insurance contract provides for arbitration of claims arising under the underinsured motorist coverage "[i]f we [Nationwide] and the insured do not agree about the insured's right to recover damages or the amount of damages * * *." Having found that Gordon was an insured within the scope of the underinsured motorist

coverage, his legal representative, King, is entitled to an order that Nationwide arbitrate his claim pursuant to the policy.

Accordingly, we reverse the judgment of the court of appeals and [***19] reinstate the judgment of the trial court.

Judgment reversed.

66 Ohio App. 3d 576, *; 585 N.E.2d 884, **;
1990 Ohio App. LEXIS 2145, ***

LEXSEE 66 Ohio App.3d 576

DECKER, Exrx., et al.,
Appellants,
v.
CNA INSURANCE COMPANY
et al.,
Appellees

No. 89-P-2106

Court of Appeals of Ohio,
Eleventh Appellate District,
Portage County

66 Ohio App. 3d 576; 585 N.E.2d 884; 1990 Ohio App. LEXIS 2145

June 4, 1990, Decided

SUBSEQUENT HISTORY:
[***1]

Reporter's Note: An appeal to the Supreme Court of Ohio was dismissed as having been improvidently allowed in (1991), *61 Ohio St.3d 1201, 572 N.E.2d 689.*

66 Ohio App. 3d 576, *; 585 N.E.2d 884, **;
1990 Ohio App. LEXIS 2145, ***

PRIOR HISTORY:

CHARACTER OF PROCEEDINGS: Civil Appeal from Portage County Court of Common Pleas; Case No. 88CV1414.

DISPOSITION:

Judgment reversed and cause remanded.

COUNSEL:

Ralph Oates, for appellants.

Gary L. Nicholson and *John B. Robertson*, for appellees.

JUDGES:

Ford, Judge. Christley, P.J., and Joseph E. Mahoney, J., concur.

OPINIONBY:

FORD

OPINION:

[*577] [**885] On May 2, 1987, Robert L. Decker was struck and killed by an automobile while jogging in Portage County, Ohio. The automobile was driven by Christopher R. Albert who, at the time of the accident, was insured by Federal Kemper Insurance Company, under a policy of insurance which carried a bodily injury liability limit of $ 25,000 for each person and $ 50,000 each occurrence.

The decedent had been employed by appellee, Envirodyne Industries. Envirodyne had provided the decedent with a company car, as well as insurance on the car, through the appellee, CNA Insurance Company.

Appellant, Laurie Decker, the executrix of decedent's estate, accepted $ 25,000 [***2] in full settlement from Federal Kemper Insurance Company. Further, appellant endeavored to make a claim against the underinsured provisions of Envirodyne's insurance policy with appellee. When appellee refused to recognize the claim, appellant commenced a declaratory judgment, on September 21, 1988, requesting a determination as to whether the decedent was an "insured," pursuant to the "uninsured/underinsured motorist" provisions contained in the appellee's policy.

Under the terms of the uninsured motorist policy drafted by appellee, the following persons/entities were insured under the policy:

"D. WHO IS INSURED

"1. *You* or any *family member*.

[*578] "2. Anyone else *occupying* a covered *auto* or a temporary substitute for a covered *auto*. The covered *auto* must be out of service because of breakdown, repair, servicing, loss or destruction.

"3. Anyone for damages he is entitled to recover because of *bodily injury* sustained by *another insured*." (Emphasis *sic.*)

Appellee's policy contains a provision defining certain terms of art contained in the policy. "You" or "your" is defined by the policy to be "the person or organization shown as the [***3] named insured * * *." The named insured in the policy in question was Envirodyne. The policy further defines "family member" as "a person related to [**886] *you* by blood, marriage or adoption who is a resident of your household * * *." The uninsured motorist provision does not contain any special definitional wording which would limit the applicability of the policy to persons or family members in the scope of their employment. Instead, it would appear as if appellee utilized the same form for both corporate and personal automobile insurance policies.

Appellee, along with Envirodyne, filed a joint motion for summary judgment on April 3, 1989. Attached to this motion for summary judgment was an affidavit from an officer of Envirodyne which stated that it was not the intent of either Envirodyne or appellee that the decedent be covered for the accident at issue. On July 11, 1989, appellant filed a brief in support of declaratory judgment and in opposition to summary judgment. This brief did not dispute appellees' affidavit; instead, the brief asserted that the decedent was covered by the insurance company as a matter of law.

After oral arguments on the motion for summary [***4] judgment, the trial court, on July 28, 1989, issued an order stating:

"The Court finds that neither the Plaintiff, the Decedent nor the Decedent's Estate are insured under the Defendant's

Insurance Policy, and that there is no dispute of material fact that the decedent was not in the scope of his employment at the time of his injury and death and was not operating a company owned vehicle."

Appellant timely filed a notice of appeal from this order and raises the following assignment of error:

"The trial court erred in sustaining the defendants' motion for summary judgment."

Prior to any consideration of the merits of appellant's assignment, however, this court must first consider the threshold issue of whether appellant's assignment is properly cognizable by this court. Appellees argue that the grant of summary judgment is proper because appellant failed to contradict, in any way, the allegations in their motion.

[*579] "* * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth [***5] specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Civ.R. 56(E).

Appellees' argument is traditionally very compelling and would prevail in the case *sub judice* except that it assumes that appellant relied solely on a paper refutation of appellees' contentions. However, appellant also provided the court with the insurance policy in question. The provisions of the insurance policy itself contradict

appellees' assertions and demonstrate genuine issues for trial. This court is, therefore, capable of considering appellant's argument.

The underlying issue in this case, which is the construction of an ambiguous insurance provision, has been the subject of considerable judicial scrutiny of late. Several courts, including this one, have addressed the question of who the insured party is in policies of uninsured/underinsured motorist coverage, where the form in question is used for both corporate and personal use. The interpretive difficulty in construing these provisions (which are all very similar to that in the case *sub judice*) is in construing phrases such as "you" or "a [***6] family member." The dilemma that one reaches when interpreting these provisions was set forth in *Aetna Cas. & Surety Co. v. Borden, Inc.* (Sept. 15, 1989), Lake App. No. 88-L-13-163, unreported, at 8, *1989 WL 107031,* as follows:

"* * * '[Y]ou,' in the quoted language, indicates the named insured, the corporation; [a family member] becomes a nonsensical phrase when describing a relative of a corporation; a second possible interpretation of 'a relative' or 'you' could be 'an employee.' Thus, the court [is] faced with ambiguous language."

The starting point for the investigation of the question of whether decedent was [**887] covered by the appellee's insurance policy is *King v. Nationwide Ins. Co. (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380.* In *King*, the Ohio Supreme Court heard a case in which the named insured was a community action agency and the injured

party was one of the agency's employees. This employee was driving a co-worker's car (rather than the agency's) in the scope of his employment. The policy in question defined "you" exclusively in terms of the agency and also contained language defining "family member" in the same manner as the policy in the [***7] case *sub judice*.

At trial, the insurance company argued that the word "relatives" in the form was a nullity, resulting solely from the cross-pollination of insurance [*580] forms for individuals and business entities. The Ohio Supreme Court, however, held that "[w]here provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *Id.* at syllabus; *Faruque v. Provident Life & Acc. Ins. Co. (1987), 31 Ohio St.3d 34, 31 OBR 83, 508 N.E.2d 949,* at syllabus. The *King* court noted that interpreting phrases such as "[r]elatives living in your household" as relatives of the corporation was "manifestly absurd." *King, supra, 35 Ohio St.3d at 212, 519 N.E.2d at 1384.* The "relatives" phrase could also mean "the employees of the corporation," "the relatives of the employees of the corporation," or simply be construed as a nullity. Consequently, the court held that the phrase "a relative living in your household," in the business entity context, was inherently ambiguous and must be construed in such a way as to include the insured.

Five [***8] months after the release of *King*, the Ninth District Court of Appeals, in *Simon v. Midwestern Indemn. Co.* (Aug. 31, 1988), Lorain App. No. 4346, unreported, *1988 WL 93220,* had occasion to construe an insurance

policy similar to the one found in *King*. In *Simon*, the injured party, not within the scope of his employment, was struck and killed by an uninsured motorist. The decedent's employers had taken out uninsured motorist insurance, with the company designated as the named insured and with provisions in the policy extending coverage to the "relatives" of the named insured. The *Simon* court, applying *King*, held that the decedent was covered by the company's uninsured motorist policy, even though he had not been within the scope of his employment at the time of the accident. Since "[t]he automotive policy in controversy [did] not specifically provide that 'insureds' were only covered if they [were] acting within the scope of their employment at the time they [were] injured[,]" the *Simon* court found the trial court's construction of the policy in favor of the insurers to be clearly contrary to law. *Simon, supra*, at 5.

This court also had [***9] occasion to hear a case involving an uninsured motorist policy similar to the case *sub judice*, in *Aetna, supra*. In *Aetna*, the company in question, Carroll Glass, was designated as the named insured on the insurance policy, a policy which also contained language covering the "relatives of the same household." The daughter of one of the employees of Carroll Glass, who was not an employee of the company, was injured while driving in a car, not owned by the company and outside of any company business.

This court, examining the insurance policy in *Aetna*, and applying the logic of *King* and *Simon*, stated that the employee of Carroll Glass was covered [*581] under the

provisions of the uninsured motorists policy and, "as [the insurer] has seen fit to amplify its coverage via the residential relative clause [the daughter] is also covered under the auspices of the policy." *Aetna, supra*, at 7-8. Further, in *Aetna*, this court took exception to Professor Widiss's treatise, Widiss, Uninsured and Underinsured Motorists Insurance (1985) 60, Section 4.4, quoted in *Aetna*, at 10. Widiss had opined that courts tend to limit analysis such as that found in [***10] *King* to situations in which the employee was engaged in the scope of his or her employment. This court noted, however, that Ohio law, as set forth in *King*, required that ambiguous 0 provisions were to be construed liberally in favor of the insured. Acceptance of Widiss's position, [**888] therefore, would require the adoption of a provision which did not encompass the full scope of persons who could be insured under the policy. Such a reading, the court felt, would scarcely comport with the liberal construction of the insurance provisions mandated by *King*.

In conclusion this court, in *Aetna*, observed:

"A reading of the insurance policy in the way advocated by the trial court may well extend appellant's liability beyond what [the insurer] had originally intended. However, appellant had the opportunity, when drafting the policy provisions, to formulate specific exclusions from coverage. 'Where exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof.' *Home Indemnity Co. v.*

[***11] *Plymouth (1945), 146 Ohio St. 96 [32 O.O. 30, 64 N.E.2d 248],* paragraph two of the syllabus. (Further citations omitted.) Having drafted the insurance policy provisions and dictated its terms to its insureds [the insurer] must now 1 accept the consequences of its own overinclusive drafting." *Aetna, supra*, at 11-12.

Appellees argue that the language of their policy does not cause the ambiguities inherent in *King* and *Aetna*. Appellees support this contention by stating that the terms "you" and "family member" are defined in the policy itself. Appellees' policy defines "you" as the "person or organization shown as the named insured in the policy." The named insured of the policy is Envirodyne. Appellees further note that "family member" is defined by the policy as "a person related to you [the named insured] by blood, marriage or adoption who is a resident of your household * * *." Appellees conclude that, since decedent was clearly not a relative of Envirodyne, he was not covered by the insurance policy.

This conclusion is incorrect as a matter of law. Appellees' contention essentially states: "* * * that language, which is nonconforming or ambiguous, is simply [***12] the by-product of the cross pollination of insurance forms for [*582] varying purposes. This contention is contrary to law. Each word in an insurance contract is presumed to have been included for a purpose and must be given some meaning. *National* 2 *Life and Accident Ins. Co. v. Ray (1927), 117 Ohio St. 13, 22 [158 N.E. 179, 182]*. When an insurance company provides an insured with a policy, which it has drafted, containing

terms with which it intends to bind the insured, the insurance company must expect to be held to the obligations which it, through its own drafting, has subjected itself." *Aetna, supra*, at 10.

In the case *sub judice*, like *Aetna, King*, and *Simon*, this court is faced with attempting to interpret a provision which could easily insure several different persons or no person at all. As a matter of law, in the interpretation of these provisions, courts have construed the language to include the employee under the protection of the policy.

Appellees direct this court's attention to *Troy Model Laundry, Inc. v. Robinson (Nov. 17, 1989), Sandusky App. No. S-88-41, 1989 WL 138117,* urging that the case is directly on point and should [***13] be considered dispositive of the issue. *Troy Model Laundry* case, in which the Sixth District Court of Appeals held that a pedestrian, not in the scope of his employment, was not covered by his company's uninsured motorist policy is in contravention not only of *Aetna*, but also of *King*. As the *Troy Model Laundry* case is not binding on this court, and as it fails to apply *King* and its progeny, we decline to follow it.

Appellees further contend that appellant should be precluded from coverage because the decedent was outside the scope of his employment at the time of the accident. This argument is without merit for several reasons. First, examination of the insurance policy in question indicates that nowhere in the policy is there any restriction which limits coverage to persons within the scope of their

employment. As noted, it has long been a governing rule of contractual interpretation that what "is not clearly excluded from the operation of such contract is included in the operation thereof. [**889] " *Home Indemn. Co., supra,* at paragraph two of the syllabus.

Moreover, appellees point to no case law which indicates that underinsured motorist [***14] coverage is only available to persons within the scope of their employment. In fact, in *Simon*, the Ninth District, construing an insurance policy remarkably like the one at bar, found that the employee was protected 4 by the uninsured motorist protections of his company's policy, despite not being within the scope of his employment at the time of his death. Similarly, this court, in *Aetna*, extended the ambit of the policy in question to cover a woman who was not only not within the scope of her employment, but was not even an employee of the corporation at all. Nor does the fact that the [*583] decedent was a pedestrian bar him from the protection of the insurance policy. Ohio law is replete with instances where courts have found a litigant to be entitled to benefits, arising from uninsured/underinsured motorist insurance, despite having been pedestrians at the time of the accident. See, *e.g., Dues v. Hodge (1988), 36 Ohio St.3d 46, 521 N.E.2d 789; Shear v. West American Ins. Co. (1984), 11 Ohio St.3d 162, 11 OBR 478, 464 N.E.2d 545.*

Appellant's assignment has merit.

Therefore, for the reasons set forth in this opinion, the judgment of the trial court is [***15] reversed and this

case remanded for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

Christley, P.J., and Joseph E. Mahoney, J., concur.

CONCURBY:
CHRISTLEY

CONCUR:

Christley, Presiding Judge, concurring.

I concur with the well-written opinion of the majority. That opinion comes to the only legal conclusion possible despite the absurdity of that conclusion 5 from a common-sense viewpoint.

Nevertheless, this court is duty bound to follow the legal principles, precepts and case law presently existing in Ohio until such time as the legislature or the Ohio Supreme Court sees fit to change those guidelines.

LEXSEE 2003 Ohio App. LEXIS 555

CAROL OAKAR, ET AL.,
Plaintiffs-Appellants,
-vs-
ST. PAUL FIRE & MARINE INSURANCE COMPANY,
Defendant-Appellee.

NO. 79699

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2003 Ohio 552; 2003 Ohio App. LEXIS 555

February 6, 2003, Date of Announcement of Decision

PRIOR HISTORY:
[**1] CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court. Case No. CV-419611.

DISPOSITION:
Reversed and Remanded.

COUNSEL:
For Plaintiffs-Appellants: HOWARD A. SCHULMAN, Schulman, Schulman & Meros, Cleveland, Ohio.

For Defendant-Appellee: PAUL D. EKLUND, RICHARD M. GARNER, Davis & Young, Cleveland, Ohio.

JUDGES:
PATRICIA ANN BLACKMON, JUDGE. ANNE L. KILBANE, J., CONCUR; MICHAEL J. CORRIGAN, P.J., DISSENTS, (SEE DISSENTING OPINION ATTACHED.)

OPINIONBY:
PATRICIA ANN BLACKMON

OPINION:

JOURNAL ENTRY and OPINION

PATRICIA ANN BLACKMON, J.:

[*P1] This is the third appeal involving plaintiff-appellant Carol Oakar's 1990 automobile accident injury case. In the first appeal, *Oakar I*, n1 we held the failure of an insured to notify the uninsured motorist/underinsured motorist (UM/UIM) carrier of a settlement with the tortfeasor does not operate to eliminate coverage where the UM/UIM claim was not legally recognized at the time of the settlement with the tortfeasor. The second Oakar case, *Oakar II*, n2 resolved a dispute over the Oakars' claim for prejudgment interest.

----------Footnotes----------

n1 *Oakar v. Farmers Ins. of Columbus, Inc. (April 17, 1997), Cuyahoga App. No. 70726, 1997 Ohio App. LEXIS 1518,* (referring to *Savoie v. Grange Mutual Ins. Co. (1993), 67 Ohio St.3d 500, 1993 Ohio 134, 620 N.E.2d 809).* [**2]

n2 *Oakar v. Farmer Ins. of Columbus, Inc. (1998), 129 Ohio App.3d 277, 717 N.E.2d 778,* (stating *Landis v. Grange Mut. Ins. Co. (1998), 82 Ohio St.3d 339, 1998 Ohio 387, 695 N.E.2d 1140,* resolved that *R.C. 1343.03(A),* rather than *R.C. 1343.03(C),* governs claims for prejudgment interest).

----------End Footnotes----------

[*P2] This appeal involves plaintiffs-appellants Carol and Bernard Oakars' claim against defendant-appellee St. Paul Fire and Marine Insurance Company (St. Paul), the insurer of Carol Oakar's employer Meridia Hillcrest Hospital's (Meridia). The Oakars claim coverage exists under both the one million dollar liability policy and the twenty million dollar excess/umbrella policy issued by St. Paul to Meridia.

[*P3] At trial, the Oakars moved for partial summary judgment claiming coverage under both policies. St. Paul moved for summary judgment claiming no coverage existed and the Oakars failed to meet various preconditions to coverage. From the trial court's grant of summary

judgment [**3] in favor of St. Paul, the Oakars appeal and assign the following errors for our review:

[*P4] *"The trial court erred in granting defendant's cross-motion for summary judgment, in denying plaintiffs' motion for partial summary judgment and in ruling that plaintiffs were not entitled to underinsured motorist coverage under either of defendant's insurance policies.*

[*P5] *"A. The trial court erred in enforcing insurance policy provisions to which plaintiffs never agreed and about which plaintiffs never knew.*

[*P6] *"B. The trial court erred in either determining that the language of defendant's insurance policies was not ambiguous or in construing ambiguous language against plaintiffs and in favor of defendant.*

[*P7] *"C. The trial court erred when it failed to find that the phrase 'legally entitled to collect from the owner or driver of an uninsured vehicle,' as used in defendant's insurance policy, is inherently ambiguous.*

[*P8] *"D. The trial court erred in enforcing an insurance policy restriction that was not allowed by the mandatory coverage required under R.C. § 3937.18(A)(2).*

[*P9] *"E. The trial court* [**4] *erred in inserting into defendant's insurance policies a 'statute of limitations' provision that did not exist in defendant's insurance policies and in holding that plaintiffs had to bring any underinsured motorist claim within either two years or four years of the accident date.*

[*P10] *"F. The trial court erred in inserting into defendant's insurance policies a 'subrogation' provision that did not exist in defendant's insurance policies.*

[*P11] *"G. The trial court erred in holding that plaintiffs failed to give timely notice to defendant of plaintiffs' potential claims for underinsurance motorist coverage.*

[*P12] *"H. The trial court erred in holding that plaintiffs' delayed notice deprived defendant of any opportunity to investigate the merits of plaintiffs' case, or to make an intelligent evaluation as to liability, damages and coverage, because there was absolutely no evidence before the trial court on that issue, nor was there any evidence that defendant suffered any prejudice as a result of the delay in notice."*

[*P13] Having reviewed the record and pertinent law, we reverse and remand this matter to the trial court for proceedings consistent [**5] herewith. We further note the impact of *Ferrando v. Auto- Owners Mut. Ins. Co.* n3 on this case. On December 27, 2002, the Ohio Supreme Court ruled that where a prompt-notice or consent to settle provision in a UIM policy was breached, the issue is whether a breach actually occurred and if so, whether the insurer suffered prejudice. n4 *Ferrando* has limited impact on this case. Here, both the liability and excess/umbrella policies required notice "whenever possible" which is distinguishable from *Ferrando's* prompt-notice provision. Further in this case, the liability policy contained a right to reimbursement clause and not a consent to settle or subrogation clause. Consistently, we conclude *Ferrando* is

inapplicable to the present notice provisions and right to reimbursement clause as these clauses appear in both the liability and excess policies, respectively.

----------Footnotes----------

n3 *98 Ohio St.3d 186, 2002 Ohio 7217, 781 N.E.2d 927.*

n4 Id.

----------End Footnotes----------

[*P14] However, in this case the excess/umbrella policy did contain a subrogation clause. [**6] Consequently, *Ferrando* is applicable, and we remand to the trial court for a determination consistent with the Supreme Court's holding in *Ferrando*. As far as the liability policy, the Oakars may avail themselves of the UM/UIM coverage.

INTRODUCTION

[*P15] In 1989, St. Paul issued both a liability policy and an excess/umbrella policy to Meridia. On January 20, 1990, Meridia's employee Carol Oakar suffered severe injuries to her person as a result of an automobile accident involving several individuals. At the time of the accident, Oakar was on her way to work. Later, her insurer, Farmers Insurance of Columbus, Inc. (Farmers), paid her medical bills and property damage from this accident.

[*P16] In February 1990, Robert Strong, an individual involved in the accident, filed a claim against Oakar. Her insurer settled the claim for $ 7,500.

[*P17] In the interim, Oakar filed a claim against tortfeasor Thomas Juhasz; Oakar asked Farmers to waive its subrogation rights, and Farmers authorized a $ 100,000 settlement of her claim against Juhasz under his policy. Oakar also filed a claim against Strong. As settlement, Strong offered the $ 12,500 maximum of [**7] his policy. Oakar agreed without informing Farmers. In *Oakar I*, this court made the following observation:

[*P18] "At the time the settlements relevant to this action were made, the law in Ohio precluded Oakar from recovering under the provision in her policy providing for uninsured or underinsured motorists insurance. However, in October 1993, the Ohio Supreme Court decided the case of *Savoie v. Grange Mut. Ins. Co.* In the third paragraph of the syllabus, the (sic: Ohio) Supreme Court held:

[*P19] "An underinsurance claim must be paid when the individual covered by an uninsured/underinsured policy suffers damages that exceed those monies available to be paid by the tortfeasor's liability carriers.

[*P20] "Following *Savoie*, Oakar and her husband made claims under the uninsured/underinsured provision of her policy. Farmers denied the claims and Oakar and her husband brought an action for the amount of their claim.

[*P21] "The Common Pleas court granted Farmers' renewed motion for summary judgment and denied Oakar's motion for summary judgment without comment." n5

----------Footnotes----------

n5 (Citations omitted).

----------End Footnotes----------[**8]

[*P22] We then reversed the common pleas court's summary judgment orders and held the following:

[*P23] "The law changed under *Savoie* and allowed Oakar to make a claim. Oakar should not be caused to suffer a forfeiture of that claim for a breach of contract which had no effect at the time it was made. Had the parties been aware that Oakar had a viable underinsurance claim, then under the terms of the policy, 'the amount recovered from the other shall be held by that person in trust for us and reimbursed to us to the extent of our payment.'" n6

----------Footnotes----------

n6 *Oakar, 1997 Ohio App. LEXIS 1518* at *11.

----------End Footnotes----------

[*P24] We now review *Oakar III* to determine whether the Oakars may make a claim against St. Paul under her employer's liability and excess/umbrella policies.

II. LEGAL STANDARD OF REVIEW

[*P25] The facts of this case are not in dispute; rather, what law applies and its interpretation is in dispute. In matters of summary judgment, we review the case de novo. n7 As such we are not required to give deference to the [**9] trial court's ruling. The presumption is that both the trial court and this court know the applicable law. Summary judgment is a procedural device designed to terminate litigation and avoid a trial where there is nothing to try. n8 Our concern is whether the Oakars are entitled to partial judgment as a matter of law, or whether the trial court properly granted summary judgment to St. Paul. n9

----------Footnotes----------

n7 *Jones v. Shelly Co. (1995), 106 Ohio App.3d 440, 666 N.E.2d 316.*

n8 *Norris v. Ohio Std. Oil Co. (1982), 70 Ohio St.2d 1, 433 N.E.2d 615.*

n9 See *Parenti v. Goodyear Tire & Rubber Co. (1990), 66 Ohio App.3d 826, 586 N.E.2d 1121.*

----------End Footnotes----------

[*P26] An insurance policy is a contract and the parties' relationship under the insurance policy must be addressed purely in contractual terms. n10 Consequently, this court must reasonably construe the contract terms. n11 Accordingly, when the terms of the insurance contract are reasonably susceptible to more than one interpretation,

[**10] this court must strictly construe those provisions against the insurer and liberally construe them in the insured's favor. n12 Because the Oakars' assigned errors are related in many respects, we will discuss them in the whole of this opinion, and we conclude they each have merit.

----------Footnotes----------

n10 *Nationwide Mut. v. Marsh (1984), 15 Ohio St.3d 107, 15 Ohio B. 261, 472 N.E.2d 1061; Scott-Pontzer v. Liberty Mut. Fire Ins., 85 Ohio St.3d 660, 1999 Ohio 292, 710 N.E.2d 1116.*

n11 *Dealers Dairy Prods. Co. v. Royal Ins. Co. (1960), 170 Ohio St. 336, 164 N.E.2d 745.*

n12 *King v. Nationwide Ins. Co. (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380.*

----------End Footnotes----------

[*P27] In order to clarify the issues as to each policy, we will discuss the liability and excess policies separately.

III. LIABILITY POLICY

[*P28] The one million dollar liability policy contained several clauses pertinent to this case; and strikingly, several expected clauses were absent from the policy. It is [**11] undisputed that the liability policy contained an uninsured/underinsured motorist clause. It also contained the following language:

[*P29] "If we make a payment under this agreement and a protected person recovers all or part of the damages from someone else, he or she must hold the amount recovered in trust for us and return to us the amount we have paid."

[*P30] This language we interpret as a right to reimbursement. Additionally, the policy contained a notice paragraph under the heading "SOMEONE INJURED OR SOMETHING HAPPENS WHICH CAN RESULT IN A LIABILITY CLAIM." Following this heading, the liability policy stated "tell us or our agent what happened as soon as possible."

[*P31] What is noticeably absent from the policy is language requiring notice of a claim as a precondition to coverage. Additionally, no subrogation clause exists in the liability policy; nor does a clause providing a time limit for bringing a claim or action. As well, the liability policy does not include any restriction limiting coverage to employees acting in the scope of employment. With these facts in perspective, we turn to the law of the case.

[*P32] As we stated earlier, the Oakars [**12] are entitled to claim against the liability policy of Carol Oakar's employer. The Oakars' case is identical to *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*, n13 where the Ohio Supreme Court held that as a matter of law a U.M. policy defining "you" as a corporation is ambiguous regardless of other definitions which might include some individuals. The court reasoned a corporate entity acts "only by and through real live persons." n14 Since a corporation cannot operate a vehicle, the supreme court

added that it is logical to conclude that the intent was to extend coverage to its employees. n15 This ambiguity ultimately led the supreme court to conclude that Pontzer, an off-duty employee, was covered under the U.M. policy. In this case, the UM/UIM policy clause contains nearly identical language as in Scott-Pontzer responding to "who is an insured." The policy stated "You Are." This language is ambiguous. As such, Carol Oakar, an employee of Meridia, is covered under its UM/UIM liability policy.

----------Footnotes----------

n13 (1999), *85 Ohio St.3d 660, 1999 Ohio 292, 710 N.E.2d 1116.*

n14 *Id., 85 Ohio St.3d 660, 1999 Ohio 292, 710 N.E.2d 1116*

n15 *Id., 85 Ohio St.3d 660, 1999 Ohio 292, 710 N.E.2d 1116*

----------End Footnotes---------- [**13]

[*P33] St. Paul, however, argues Carol Oakar was not acting within the scope of her employment at the time of the accident. In reading Scott-Pontzer, we conclude exclusive language or restrictive language referencing course or scope of employment must be stated in the policy. The absence of, or ambiguity regarding, such language is construed in favor of the insured. n16 Accordingly, we will not conclude Oakar was acting

outside the course or scope of her employment when this accident occurred.

----------Footnotes----------

n16 See King.

----------End Footnotes----------

[*P34] St. Paul additionally argues the liability policy language obligating them in the event a party "legally entitled to collect from the owner or driver of an insured vehicle" does not apply to the Oakars because they settled their claims. In *Martin v. Liberty Mutual Insurance Co.*, n17 Judge Dowd resolved this concern as follows:

[*P35] "Defendant Midwestern first argues that Plaintiffs are barred from recovering any UIM benefits by virtue of the language in both the auto policy [**14] and *R.C. § 3937.18(A)*.

----------Footnotes----------

n17 (N.D. Ohio 2001), *187 F. Supp. 2d 896*

----------End Footnotes----------

[*P36] "The auto policy's UIM endorsement and *O. R.C. § 3937.18(A)* provide that the insurer (Midwestern) will pay damages for bodily injury to an insured person who is 'legally entitled to recover' from the owner or

operator of an (sic: uninsured) or underinsured motor vehicle. Defendant argues that, because Plaintiffs have settled their claim against the tortfeasor, they are not legally entitled to recover damages from the owner/operator of the motor vehicle. As a result, Defendant contends that Plaintiffs are not entitled to UIM coverage benefits under the policies at issue.

[*P37] "To Defendant's misfortune, the Ohio Supreme Court does not share Defendant's interpretation. Rather, the court stated that the phrase 'legally entitled to recover' means the insured must be able to prove the elements of his or her claim against the tortfeasor. * * * As in this case, the plaintiff [**15] in [*Ohayon v. Safeco Ins. Co. of Ill., 91 Ohio St.3d 474, 2001 Ohio 100, 747 N.E.2d 206* had already settled with the tortfeasor. Accordingly, Plaintiffs' ability to prove the elements of their claim and recover damages from the tortfeasor is not at issue, and Defendant's argument is without merit." n18

----------Footnotes----------

n18 *Martin, 187 F. Supp. 2d at 902.*

----------End Footnotes----------

[*P38] We agree with Judge Dowd's interpretation of present Ohio case law. Accordingly, whether Oakar could legally prove her claim is not at issue.

[*P39] St. Paul further argues that the Oakars cannot recover because they failed to give notice of their claims.

In *Martin*, Judge Dowd recognized that the historical case law in Ohio is that a policy containing ambiguous language as to whether notice is a precondition to coverage must be strictly interpreted in favor of the insured and a gainst the insurer. n19 In this case, the notice language merely requires the Oakars to notify the insured as soon as possible. It does not require notice as a condition precedent to coverage [**16] and does not require prompt notice.

----------Footnotes----------

n19 *Id., 187 F. Supp. 2d 896,* citing *Weiker v. Motorists Mut. Ins. Co. (1998), 82 Ohio St.3d 182, 1998 Ohio 373, 694 N.E.2d 966.*

----------End Footnotes----------

[*P40] The notice provision clearly requires notice as soon as possible. It is not a prompt- notice provision.

[*P41] We now turn to the issue regarding subrogation. In this case, the liability policy does not have a subrogation clause. It has a right to reimbursement clause. Subrogation and reimbursement are two different concepts. Subrogation allows the insurance company to recover from the tortfeasor money it paid in benefits on behalf of its insured. Reimbursement allows the insurance company to collect such payments from its insured after the insured has received full settlement from the tortfeasor. n20 The Oakars have stated that they will comply with the reimbursement clause of the liability policy.

----------Footnotes----------

n20 *Curp v. Stone (Feb. 16, 1996), Montgomery App. No. 14805, 1996 Ohio App. LEXIS 461.*

----------End Footnotes----------[**17]

[*P42] Finally, we note that the trial court held that the statute of limitations expired in this case. This is a contract action, and as such a 15 year statute of limitations applies. The liability policy did not contain a further limitation regarding when an action must be brought; consequently, we determine the 15 year statute of limitations controls in this case. Because the accident occurred less than 15 years from the date Oakar filed this action, her claim is not time-barred.

IV. EXCESS POLICY

[*P43] The excess policy did not contain UM/UIM coverage. In *Martin* and *Scott-Pontzer,* the courts recognized the prevailing case law in Ohio is that insurance companies must offer UM/UIM coverage. In *Gyori v. Johnston Coca-Cola Bottling Group, Inc.,* n21 the Ohio Supreme Court held no rejection of such coverage can exist absent a written offer of UM/UIM coverage. In this case, we conclude St. Paul failed to comply with *R.C. 3937.18* as it existed in 1989, and coverage is provided by operation of law. n22

----------Footnotes----------

n21 (1996), *76 Ohio St.3d 565, 1996 Ohio 358, 669 N.E.2d 824.* [**18]

n22 *Martin.*

----------End Footnotes----------

[*P44] Unlike *Scott-Pontzer*, the excess policy in this case does not have a scope of employment exclusion. Consequently, we conclude that Carol Oakar is an insured under the umbrella/excess policy, and we adopt the reasoning utilized above in the liability policy section of this opinion.

[*P45] We also adopt the identical reasoning for the precondition to coverage issues in that section of this opinion as it relates to notice and time limitations of actions. We note again that the excess policy did not have a prompt-notice provision.

[*P46] However, the excess policy does contain a subrogation clause. Consistent with *Ferrando,* we remand this case to the trial court for a determination of both breach and prejudice.

V. CONCLUSION

[*P47] Consequently, we hold that the Oakars may avail themselves of the liability policy because no prompt-notice or subrogation clause is contained therein. However, in the excess policy, a subrogation clause exists, and as

such, the trial court consistent with *Ferrando* must resolve the breach and prejudice [**19] issues as they relate to the subrogation clause of this excess policy.

Judgment reversed and remanded.

It is, therefore, considered that said appellants recover of said appellee their costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANNE L. KILBANE, J., CONCUR;

MICHAEL J. CORRIGAN, P.J., DISSENTS,

(SEE DISSENTING OPINION ATTACHED.)

PATRICIA ANN BLACKMON

JUDGE

DISSENTBY:
MICHAEL J. CORRIGAN

DISSENT:

MICHAEL J. CORRIGAN, P.J., DISSENTING:

[*P48] Although I am forced to agree that Oakar is an "insured" under the St. Paul policies by virtue of *Scott-Pontzer v. Liberty Mut. Fire Ins. Co. (1999), 85 Ohio St.3d*

660, 1999 Ohio 292, 710 N.E.2d 1116, I respectfully disagree with the majority's conclusion that Oakar did not destroy St. Paul's right to notice under either the liability policy or the excess policy.

[*P49] Throughout the proceedings, Oakar has insisted that she did not have to abide by the terms of the insurance policy because uninsured motorists coverage arose by operation [**20] of law and therefore none of the restrictions contained in the policy would apply to her. In fact, she explicitly made this point to St. Paul when confronted with the policy provisions relating to notice. See St. Paul's Cross-Motion for Summary Judgment, Exhibit 6.

[*P50] Oakar has it wrong. It is important to understand that *Scott-Pontzer* found that UM/UIM coverage applied by operation of law in that case because the employer's general liability policy did not include UM/UIM coverage under an umbrella/excess insurance policy. This case is different, however, because the St. Paul liability policy did include UM/UIM coverage. *Scott-Pontzer* is only relevant for the limited purpose of determining whether Oakar was an insured -- not whether UM/UIM coverage arises as a matter of law.

[*P51] The Supreme Court has stressed repeatedly that an insurance policy is a contract. See *Scott-Pontzer, 85 Ohio St.3d at 663.* Oakar's coverage may have arisen as a matter of law, but that does not mean that she is excused from complying with all the terms of the policy. To find otherwise would be the functional equivalent of voiding the contract, for Oakar's interpretation [**21] of the law would

permit her all the benefits of a contract without holding her to any of the mutual obligations contained in the contract. That would be an absurd result under the law.

[*P52] One of the obligations contained in the St. Paul policy was a provision requiring Oakar to give St. Paul notice of an occurrence "as soon as possible" and to "promptly send us copies of any legal papers if a suit is brought." In addition, the policy placed on Oakar the obligation to inform St. Paul of any settlement, for the terms of the policy permitted St. Paul to refuse to "cover any claim that is settled without our consent." All of these terms were material under the contract since the parties agreed that "no one can sue us [St. Paul] to recover under this policy unless all of its terms have been lived up to."

[*P53] The parties have stipulated that Oakar did not comply with these contract terms. Although the incidents giving rise to her claim arose in January 1990, she did not notify St. Paul of her claims against the tortfeasors until August 2000. See Joint Stipulations at paragraph 22. Likewise, Oakar did not inform St. Paul that she had settled her claims against tortfeasor [**22] Strong until August 2000. Id. at paragraph 26. I would find that these stipulations amount to a concession that Oakar was in breach of the St. Paul policy.

[*P54] The majority maintains that the provision requiring "notice as soon as possible" is not the same thing as a "prompt-notice" provision. Perhaps St. Paul's goal of writing the policy in plain English as opposed to legalese has come back to haunt it -- I suppose in the abstract one might be on notice of an obligation under the policy but not

have the chance to give notice until some time later. But that is not the case here. As a matter of law, *Scott-Pontzer* applies retroactively as though the law pronounced in that case has always existed. See *Peerless Elec. Co. v. Bowers (1955), 164 Ohio St. 209, 210, 129 N.E.2d 467; Heiney v. Hartford, Franklin App. No. 01 AP-1100, 2002 Ohio 3718.* This being the case, Oakar cannot rationally argue that she only became aware of the viability of her claim after *Scott-Pontzer* had been released. In *Gruelich v. The Hartford, Cuyahoga App. No. 80987, 2002 Ohio 7229,* we addressed this precise issue and held that a delay in waiting [**23] for a favorable decision does not constitute a reasonable excuse for failing to give notice of a claim. The law announced in *Scott-Pontzer* was in place in 1990, there for Oakar's taking. She chose not to file her claim then and waited ten years to do so. Under no stretch of the imagination could this be considered notice "as soon as possible."

[*P55] Finally, the majority's conclusion that the policy "does not require notice as a condition precedent to coverage" is effectively contradicted by policy language saying, "no one can sue us to recover under this policy unless all of its terms have been lived up to." Notice was a term of the policy and Oakar did not live up to that term. In short, she materially breached the policy.

[*P56] The remaining question would be whether Oakar could show that St. Paul did not suffer any prejudice. Ordinarily, this would be a question of fact under *Ferrando*. However, the facts of this case lead me to conclude that Oakar could not, as a matter of law, show that St. Paul did not suffer prejudice from her failure to

give notice as soon as possible. The undisputed facts show that Oakar was involved in a three-car accident. Oddly, she [**24] settled with tortfeasor Strong and, for reasons that have never been clear, received her own settlement from Strong. It is, to say the least, highly unusual for cross-settlements between parties involved in an accident. At bottom, these facts suggest that there was liability to go around, and St. Paul no doubt would have had something to say about these settlements had it been given notice as soon as possible. In any event, Oakar has made no suggestion that her settlements did not prejudice St. Paul, so there would be no need to remand the matter back on that issue.

[*P57] Accordingly, I would find that Oakar is in material breach of the policy by failing to give St. Paul notice of her claims that arose in 1990. Obviously, her inability to recover under the liability would vitiate recovery under the excess policy as well. I would therefore affirm the judgment in St. Paul's favor.